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# Supreme Court of the United States

OCTOBER TERM, 1952

No. 236

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J. LADEFOGED,

*Petitioner,*

against

SVALT JORGEN LARSEN,

*Plaintiff-Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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## BRIEF FOR THE PETITIONER

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# Supreme Court of the United States

**OCTOBER TERM, 1952**

**No. 226**

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J. LAURITZEN,

Petitioner,

against

EVALD JOHANN LARSEN,

Plaintiff-Respondent.

---

**On Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## BRIEF FOR THE PETITIONER

---

### Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit is reported at 196 F. (2d) 220 and is printed at pages 127-128 of the record.

### Jurisdiction

The final judgment of the United States Court of Appeals for the Second Circuit was entered on May 2, 1952 (129-130). The petition for a writ of certiorari was filed July 25, 1952, and was granted October 13, 1952 (132). The jurisdiction of this Court to grant a writ of certiorari is provided by Title 28, United States Code, Section 1254.

## The Question Presented

Does the Jones Act (Section 33 of the Act of June 5, 1920, C. 250, 41 Stat. 988, 1007, Title 46, United States Code, § 688) govern the liability of a foreign shipowner to a foreign seaman who signs on a foreign vessel in a United States port and is subsequently injured aboard the vessel in a foreign port as a result of the negligence of a fellow-seaman when that foreign seaman has recovered all the benefits to which he is entitled under the articles which he has signed and under the laws of the country whose flag that vessel flies?

## The Statute Involved

Section 33 of the Act of June 5, 1920, C. 250, 41 Stat. 988, 1007, Title 46, United States Code, § 688, known as the Jones Act, reads as follows:

"SEC. 33. That section 20 of such Act of March 4, 1915, be, and is, amended to read as follows:

'SEC. 20. That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.'"

## Statement

The complaint was filed on behalf of Evald Johann Larsen to recover the sum of $15,000 for injuries allegedly received while serving as an able-bodied seaman on board the S.S. Randa on October 7, 1946. Liability was predicated on the negligence of the defendant-owner through its employees under the provisions of the Jones Act.

On July 25, 1946, Evald Johann Larsen, a Danish citizen and a resident of Denmark who was temporarily in New York City, signed articles to serve aboard the S.S. Randa as an A.B. at the standard rate of pay agreed upon by the Danish Seamen's Union (pre-trial order, 16, 44, Def. Exh. A, 45). The S.S. Randa was a vessel flying the Danish flag and so registered, and was owned and operated by the petitioner, J. Lauritzen (pre-trial order, 16), a Danish citizen. The articles signed by Larsen called for a voyage to South America and further (pre-trial order, 16, Def. Exh. A, 44, 45) and bound Larsen to serve aboard the S.S. Randa for an indefinite period with the right to leave the vessel on seven days' notice, the owner having a similar right to discharge Larsen on seven days' notice (47).

The articles further stated that each member of the ship's crew was employed "on the basis of the regulations contained in the (Danish) Seaman's Law", as well as in accordance with the provisions set forth opposite each of their signatures (Def. Exh. A, 44, 45, middle of 1st page, directly above heavy horizontal line, also 2nd page, column 15).[1]

After leaving New York the S.S. Randa called at various South American ports and arrived in Havana, Cuba, about the beginning of October, 1946 (26). On October 7, 1946, while the vessel was still in Havana, Larsen was injured when he fell from the top of No. 1 hatch into the hold while engaged in inserting hatch boards with a fellow seaman (33-34).

[1] See stipulation of parties on English translation of portions of

Following the accident Larsen was hospitalized in Havana, Cuba, at the petitioner's expense (pre-trial order, 15-16, 35, 49). Subsequently, Larsen was returned to the United States as a passenger aboard a vessel owned by the petitioner and upon arrival in New York was admitted to the U. S. Marine Hospital at Ellis Island, where again all hospital and medical expenses were paid by the petitioner (pre-trial order, 16, 37, 49). Larsen was discharged as an in-patient from the United States Marine Hospital on December 9, 1946, and received out-patient treatment at the petitioner's expense until January 9, 1947, at which time he was declared fit for duty (40-41, pre-trial order, 16).

Larsen received all wages due him up to the date of the accident (pre-trial order, 16, 39), and also received the seven days' wages to which he was entitled under the Danish Maritime Law (39-40, Def. Exh. D, 90-92). In addition, Larsen received maintenance and subsistence from December 10, 1946, the date he was discharged from the Ellis Island Marine Hospital, until December 30, 1946 (90). During the course of Larsen's treatment in New York, the petitioner offered Larsen free transportation to Denmark for further treatment, but this offer was refused by Larsen (50). These were the benefits to which Larsen was entitled under the Danish law as subscribed to by Larsen when he signed the articles to serve aboard the S.S. Ranja (Def. Exh. C, 20-21, 89; Def. Exh. A, 44, 45; Def. Exh. D, 90-92).

The verdict of the jury in the District Court is printed at pages 115-116 of the record. The defendant's motions to dismiss and the denial thereof by the Trial Court are printed at pages 61, 97, 116 and 117 of the record. The judgment of the District Court of the United States for the Southern District of New York is printed at page 120 of the record. There is no reported District Court opinion.

The United States Court of Appeals for the Second Circuit affirmed the judgment of the Trial Court on the authority of *Kyriakos* v. *Goulandris*, 151 F. 2d 132, 1945 A. M. C. 439 (2 Cir., 1945), and *Taylor* v. *Atlantic Maritime Co.*, 179 F. 2d 597, 1950 A. M. C. 352 (2 Cir., 1950), cert.

den. 341 U. S. 915, 71 S. Ct. 736. The opinion of the United States Court of Appeals for the Second Circuit is reported at 196 F. 2d 220 and is printed at pages 127-128 of the record and the judgment is printed at pages 129-130 of the record.

## Specification of Errors

Error is assigned to the Trial Court's rulings on petitioner's motions to dismiss and requests to charge as set forth below.

Upon the trial below in the United States District Court for the Southern District of New York before a jury the defendant, the petitioner herein, moved at the end of plaintiff's case, at the end of the defendant's case and after the jury verdict to dismiss the complaint for lack of jurisdiction. The motions were made on the grounds that this was an action between citizens of Denmark and, therefore, outside the jurisdiction of the Court and on the grounds that the Danish Law was properly applicable and not the Jones Act. These motions were denied by the Trial Court (61, 97, 116-117). The Trial Court also denied defendant's request to charge that the jury must find for the defendant if it found that the defendant had fulfilled its obligations under the Danish law (113) and the defendant excepted to the charges of the Trial Court that defendant was liable to plaintiff for injuries caused by the negligence of defendant's officers and seamen (113) no such right being given by the Danish law; and the charge that the Danish law had no application in the case (114-115).

Thereafter, the defendant, the petitioner herein, J. Lauritzen, appealed from the judgment in favor of the plaintiff as entered on December 21, 1951, and in particular from the denial of the above motions made by the defendant, as well as from the above denials of defendant's requests to charge and from the charges of the Trial Court to the effect that American law, rather than Danish law, was to be applied.

The United States Court of Appeals for the Second Circuit affirmed the judgment of the Trial Court on the authority of *Kyriakos* v. *Goulandris,* 151 Fed. 2d 132 (2nd Cir., 1945), and *Taylor* v. *Atlantic Maritime Co.,* 179 Fed. 2d 597 (2nd Cir., 1950), cert. den. 341 U. S. 915.

## Summary of the Argument

The Jones Act, being an amendment of Sec. 20 of the Seamen's Welfare Act of March 4, 1915, 38 Stat. 1185, is not by its terms or context applicable to a foreign seaman on a foreign vessel injured in a foreign port just because he signed articles on the foreign form in New York to serve aboard that vessel. This is borne out by an examination of the language of the section, both within the framework of the Seamen's Welfare Act of 1915 to which it was an amendment and within the framework of the Merchant Marine Act of 1920 in which body it was enacted. What is more, the language of the section itself contradicts any contention that it was intended to be applicable to foreign seamen serving aboard foreign vessels.

The plaintiff-respondent is suing to recover from the Danish shipowner based on an alleged act of negligence occurring in a foreign port. The liability of the shipowner, if any, is a tort liability and should be governed by the law of the site of the tort, the Danish law, since the alleged act of negligence occurred aboard the Danish vessel outside the territorial waters of the United States.

The question of the liability of the Danish shipowner to the Danish seaman for the alleged act of negligence occurring in a foreign port is a matter strictly within the internal economy and discipline of that vessel and as such should be governed by the law of the flag. This doctrine has been widely accepted and supported by our courts, and exceptions have only been carved out when the matter vitally affected the peace and tranquillity of our ports or when the terms of a statute have been made specifically

applicable by Congress to foreign vessels under certain stated conditions. Congress did not carve out such an exception when it enacted this particular section of the Jones Act.

Lastly, the two cases cited by the Court of Appeals for the Second Circuit as authority for affirming the judgment of the Trial Court are fraught with contradictions, weaknesses, essential differences in facts, and misapplication of the doctrine of *stare decisis*. In ignoring the authorities and the context of the statute, the Court of Appeals has side-stepped a consideration of the international repercussions sure to result from this interpretation of the scope of the Jones Act.

## POINT I

**The terms of the Jones Act are not applicable to and were not intended by Congress to be applicable to foreign seamen on foreign vessels who are injured beyond the territorial limits of the United States.**

The Jones Act (Sec. 33 of the Act of June 5, 1920, C. 250, 41 Stat. 988, 1007, Title 46, United States Code, § 688) which states,

> "That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply; * * * "

was an amendment of Sec. 20 of the Seamen's Welfare Act of March 4, 1915 (C. 153, 38 Stat. 1164, 1185, Title 46, United States Code, § 688), known as the LaFollette Act. Sec. 20 of this 1915 Act provided as follows prior to amendment:

> "That in any suit to recover damages for any injury sustained on board vessel or in its service seamen having command shall not be held to be fellow-servants with those under their authority."

In this manner, the fellow-servant rule as applicable to seamen was sought to be abolished. But this Court in *Chelentis* v. *Luckenbach S.S. Co.*, 247 U. S. 372, 38 S. Ct. 501, 62 L. Ed. 1171 (1918), held that Sec. 20 of the Seamen's Welfare Act of 1915, in attempting to abolish the fellow-servant rule, had imposed no additional liability upon the shipowner beyond the liabilities already existing under the General Maritime Law. This Court, while recognizing the right of the seaman to bring his action in the State Court under the "saving to suitors' clause" held that the seaman, by the abolishment of the fellow-servant rule, was given a right, but lacked the remedy to enforce that right.

Later, this Court, in commenting and passing on the constitutionality of the Jones Act, in *Panama Railroad Company* v. *Johnson*, 264 U. S. 375, 44 S. Ct. 391, 68 Law Ed. 748 (1924), in an opinion by Mr. Justice Van Devanter, wrote as follows with respect to the amendment of this Sec. 20 of the Act of 1915, at 264 U. S. 389:

> "* * * As originally enacted, § 20 was part of an act the declared purpose of which was 'to promote the welfare of American seamen.' It then provided that in suits to recover damages for personal injuries 'seamen having command shall not be held to be fellow-servants with those under their authority,' and in *Chelentis* v. *Luckenbach S. S. Co.*, *supra*, p. 384, this Court treated it as part of the maritime law, but held it did not disclose a purpose 'to impose upon shipowners the same measure of liability for injuries suffered by the crew while at sea as the common law prescribes for employers in respect of their employees on shore.' After that decision the section was reenacted in the amended form hereinbefore set forth as part of an act the expressed object of which was 'to provide for the promotion and maintenance of the American merchant marine.'"

Sec. 33 of the Merchant Marine Act of 1920, therefore, properly takes its place within the framework of the Act to which it was a partial amendment, i.e., the Seamen's Welfare Act of 1915.

The question to be determined is whether the expression "any seaman" as used in the Jones Act was intended to apply to the case of a foreign seaman injured aboard a foreign vessel in a foreign port by reason of the fact that the articles which that seaman had signed on the foreign form were signed by him in a United States port.

The answer is to be found by reference to the wording and context of the Seamen's Welfare Act of 1915. A section by section examination of the Act discloses that certain sections thereof were made specifically applicable to foreign vessels under certain stated conditions. With respect to the balance of the sections, the provisions were couched in terms applicable to United States vessels, but with no extension of their application to foreign vessels.

The Seamen's Welfare Act of March 4, 1915, known as the LaFollette Act, is entitled:

> "An Act To promote the welfare of American seamen in the merchant marine of the United States; to abolish arrest and imprisonment as a penalty for desertion and to secure the abrogation of treaty provisions in relation thereto; and to promote safety at sea."

The opening section of the 1915 Act amended Section 4516 of the Revised Statutes of the United States with respect to the requirement that a master of a vessel must sign-on, if obtainable, suitable seamen to replace those whose services have been lost by reason of desertion or casualty, and further provides that the master must report such losses to the "United States consul at the first port at which he shall arrive". This opening section is clearly restricted in its application to United States vessels by reason of the reference to United States consuls. It cannot be supposed that foreign vessels in foreign ports should

report crew deficiencies to United States consuls located in those foreign ports.

Sec. 2 makes certain provisions for the division of the crew into watches, as well as for distinctions between work on deck and work in the engineroom. It also provides that no unnecessary work shall be done on Sundays or on certain specified holidays. This section, however, is limited in its application to "all merchant vessels of the United States of more than one hundred tons gross, excepting those navigating rivers, harbors, bays or sounds exclusively * * *." Sec. 2 is clearly inapplicable to other than United States vessels.

Sec. 3 of the Act amended Sec. 4529 of the Revised Statutes of the United States with respect to the time for payment of wages to seamen on coasting voyages, as well as in the case of vessels making foreign voyages. In this section the terminology used is that "the master or owner of any vessel making coasting voyages shall pay to every seaman, * * *;" and there is no indication that the section was to apply to foreign seamen serving aboard foreign vessels. The significance of this failure to refer to foreign vessels is pointed up when we examine the provisions of Sec. 4 and especially Sec. 11 of the Act.

Sec. 4 of the Act amended Sec. 4530 of the Revised Statutes of the United States with respect to the right of a seaman to receive on demand from the master of the vessel one-half the wages earned to that point at every port where such vessel loads or delivers cargo before the end of the voyage. The opening language of Sec. 4 states that "every seaman on a vessel of the United States shall be entitled to receive on demand * * *" and then outlines his rights.

The closing portion of Sec. 4 reads as follows:

> "*And provided further*, that this section shall apply to seamen on foreign vessels while in harbors of the United States, and the courts of the United States shall be open to such seamen for its enforcement."

This Sec. 4, therefore, stands out in relation to the three sections previously considered, in that Congress considered it necessary to include this specific provision in order to extend its terms to foreign vessels, and even then the extension was itself limited to "foreign vessels *while in harbors of the United States*". No effort was made by Congress to extend its application to foreign vessels while outside the territorial waters of this country.

The terms of this Sec. 4 were fully considered by this Court in the case of *Strathearn S.S. Co.* v. *Dillon*, 252 U. S. 348, 40 S. Ct. 350, 64 L. Ed. 607 (1919), wherein Mr. Justice Day, in a unanimous opinion, held that the terms of the section were applicable to a British subject serving aboard a British vessel while that vessel was in a port of the United States. The fact that certain contracts which ran counter to the purposes of the statute were voided, did not render Sec. 4 of the statute unconstitutional as destructive of contract rights. Mr. Justice Day held that this Court had fully considered the matter in *Patterson* v. *Bark Eudora*, 190 U. S. 169, 23 S. Ct. 821, 47 L. Ed. 1002 (1903), and that there was no doubt as to the authority of Congress to pass a statute of this sort specifically applicable to foreign vessels in our ports.

Sec. 5 of the Act of 1915 amended Sec. 4559 of the Revised Statutes of the United States with respect to provisions for the handling of complaints by the officers or crew of a vessel while in a foreign port when the vessel was alleged to be in an unsuitable condition to go to sea. The wording of this section is that "upon a complaint in writing signed by the first and second officers or a majority of the crew of any vessel, while in a foreign port, * * * the consul or a commercial agent who may discharge any of the duties of a consul shall cause to be appointed" certain persons to examine into the cause of the complaint. In this section the expression "any vessel" is used, but there are no additional provisions extending the terms of the section to foreign vessels. In fact, it would be hard to imagine that Congress could have intended to regulate

the actions of foreign consuls or to have foreign seamen serving aboard foreign vessels present their complaints and problems to a United States consul in a foreign port for correction of the alleged deficiencies. Such an exercise of power by a United States consul in a foreign port with respect to a foreign vessel and foreign seamen would be totally out of line with basic theories of international jurisdiction.

Sec. 6 of the Act of 1915 amended Sec. 2 of the Act of March 3, 1897, as to the provisions for crew space and sanitary conditions aboard "all merchant vessels of the United States". This section was clearly not intended to apply to other than merchant vessels of the United States.

Sec. 7 of the Act of 1915 amended Sec. 4596 of the Revised Statutes of the United States and specified punishments for certain offenses as to "any seaman who has been lawfully engaged or any apprentice to the sea service". Here again, as to the terms "any seaman", there is no specific provision making the section applicable to foreign seamen serving aboard foreign vessels such as were found in Sec. 4, or will be found later in Sec. 11.

Sec. 8 of the Act of 1915, amended Sec. 4600 of the Revised Statutes of the United States and provided that "it shall be the duty of all consular officers to discountenance insubordination by every means in their power and, where the local authorities can be usefully employed for that purpose, to lend their aid and use their exertions to that end in the most effectual manner." The expression "all consular officers" in Sec. 8 is as general as the expression "any seaman" found in Sec. 7 and later in Sec. 11, but here again it is clear that it was the intent of Congress that "all consular officers" meant only consular officers of the United States. As stated by this Court in *Sandberg v. McDonald*, 248 U. S. 185, 39 S. Ct. 84, 63 L. Ed. 300 (1918), at 248 U. S. 195:

> "Legislation is presumptively territorial and confined to limits over which the law-making power has jurisdiction."

Sec. 9 of the Act of 1915, amended Sec. 4611 of the Revised Statutes of the United States with respect to flogging and corporal punishment "on board of any vessel". No specific application to foreign seamen aboard foreign vessels is to be found in this section. The significance of the failure to extend its application is pointed up by referring to those sections where such an extension was made.

Sec. 10 of the Act of 1915, amended Sec. 23 of the Act entitled "An Act to amend the laws relating to American seamen, for the protection of such seamen, and to promote commerce", approved December 21, 1898, 30 Stat. 755, 763, with respect to the daily requirements of water and butter. Here again, no attempt was made by the language of the section to extend its application to other than United States vessels or American seamen.

In Sec. 11 of the Seamen's Act of 1915 we find a repetition of the situation existing in Sec. 4 of that same Act. The provisions are specifically extended to foreign vessels while in waters of the United States. Sec. 11 amended Sec. 24 of the Act entitled "An Act to amend the laws relating to American seamen for the protection of such seamen and to promote commerce", approved December 21, 1898. Sec. 24 of that Act of 1898 was, in turn, an amendment of Sec. 10 of Chapter 121 of the laws of 1884, 23 Stat. 53, as in turn amended by Sec. 3 of Chapter 421 of the laws of 1886, 24 Stat. 79. Sec. 11 of the Act of 1915 amended all these prior statutes as to the prohibition against paying "any seaman" wages in advance of the time when he had actually earned the same. Sub-section (e) of this Sec. 11 of the Act of 1915 reads as follows:

> "That this section shall apply as well to foreign vessels while in waters of the United States, as to vessels of the United States, and any master, owner, consignee or agent of any foreign vessel who has violated its provisions shall be liable to the same penalty that the master, owner, or agent of a vessel of the United States would be for similar violation."

Sub-section (a) of this section used the words "that it shall be and is hereby made unlawful in any case to pay any seaman wages in advance * * *." Yet, in spite of the use of the words "any seaman" Congress deemed it necessary to add sub-section (e) in order to extend the terms of this section to apply as well to foreign vessels in the waters of the United States. In other words, Congress did not believe that the use of the expression "any seaman" was in and of itself sufficient to require application to foreign vessels, even if those vessels were in the ports of the United States.

This situation finds an immediate parallel in the wording of the Jones Act which was, of course, an amendment of Sec. 20 of this same Seamen's Welfare Act of 1915. The opening language of the Jones Act reads, "That any seaman who shall suffer personal injury in the course of his employment may * * *." But there is no provision contained in Sec. 20, as amended, applying that section to foreign vessels under any circumstances whatsoever.

If Congress had intended that the Jones Act should apply to injuries sustained by foreign seamen aboard a foreign vessel while outside the territorial waters of the United States, the necessary language was at hand for them specifically so to provide. It is significant that Congress added no such provisions.

In *Patterson* v. *Bark Eudora, supra,* this Court considered the effect of Sec. 24 of the Act of December 21, 1898, 30 Stat. 755, 763, to which Sec. 11 of the Seamen's Act of 1915 was an amendment, as described above. This Sec. 24 of the Act of December 21, 1898, similarly made it unlawful in any case to pay "any seaman" wages in advance of the time when he had actually earned same. It further stated that the provisions of the section were to be applicable as well to foreign vessels as to vessels of the United States.

The case involved primarily a question of the power of Congress to enact such a provision applicable to foreign

vessels. In the words of Mr. Justice Brewer, at 190 U. S. 173:

> "But the main contention is that the statute is beyond the power of Congress to enact, especially as applicable to foreign vessels. It is urged that it invades the liberty of contract which is guaranteed by the Fourteenth Amendment to the Federal Constitution * * *."

The Court held that the provision making this section of the Act specifically applicable to foreign vessels was constitutional and within the domain of Congress under the commerce clause of the Constitution.

It has been contended on behalf of the plaintiff-respondent that the remedy of the Jones Act is available to foreign seamen serving aboard foreign vessels, and it is further contended that such a conclusion finds support in the decision of this Court in *Patterson* v. *Bark Eudora, supra.* As a matter of fact, the decision of this Court in *Patterson* v. *Bark Eudora* can have no parallel application to the provisions of the Jones Act, since, as has been pointed out, *Patterson* v. *Bark Eudora, supra,* involved the constitutionality of a section specifically applicable to foreign vessels, whereas the Jones Act contains no such provision. The most that can be said for this case in connection with the applicability of the Jones Act to foreign vessels and foreign seamen is that Congress would have been within Constitutional limits *if* it had held that the Jones Act was to apply to foreign vessels and foreign seamen serving on those vessels *while in waters of the United States.* The value of the holding in *Patterson* v. *Bark Eudora, supra,* to the facts herein is totally vitiated by the fact that Congress made no such provision in the Jones Act, let alone as to injuries to an alien on a foreign vessel in a foreign port or on the high seas.

Later, this Court considered the interpretation of this Sec. 11 of the Act of 1915 in *Sandberg* v. *McDonald,* 248 U. S. 185, 39 S. Ct. 84, 63 L. Ed. 300 (1918). This Court

held that the provisions of Sec. 11 did not apply to advancements made in foreign ports to alien seamen shipping abroad on foreign vessels, pursuant to contracts valid under the foreign law, in the following language at 248 U. S. 195:

> "Had Congress intended to make void such contracts and payments a few words would have stated that intention, not leaving such an important regulation to be gathered from implication."

And later at page 196:

> "In the same section, which thus applies the law to foreign vessels while in waters of the United States, it is provided that the master, owner, consignee, or agent of any such vessel, who violates the provisions of the act, shall be liable to the same penalty as would be persons of like character in respect to a vessel of the United States. This provision seems to us of great importance as evidencing the legislative intent to deal civilly and criminally with matters in our own jurisdiction. Congress certainly did not intend to punish criminally acts done within a foreign jurisdiction; a purpose so wholly futile is not to be attributed to Congress."

For the reasons discussed above with respect to *Patterson* v. *Bark Eudora, supra,* the *Sandberg* case is equally undeterminative of the extent of the application of the Jones Act, since the *Sandberg* case also involved the interpretation of a section of the statute specifically extended to foreign vessels. It must be noted, however, that in spite of Congress' intent to make Sec. 11 applicable to foreign vessels while in waters of the United States, this Court held that the doctrine was not to be extended beyond the territorial limits of the United States both by reason of the statute and for reasons of common sense.

How then can we justify the application of the Jones Act to an injury to an alien seaman aboard a foreign vessel while in a foreign port, when the wording of the Jones Act contains no provision making it applicable to foreign

seamen serving aboard foreign vessels under any geographical conditions whatsoever?

Sec. 12 of the Act of 1915 repealed Sec. 4536 of the Revised Statutes of the United States and provided that no wages due or accruing to "any seaman" or apprentice should be subject to attachment or arrestment. Note that Sec. 12, as does Sec. 11, uses the expression "any seaman" and yet Sec. 12 contains no specific extension to foreign vessels. If a specific extension was required in Sec. 11 after the use of the expression "any seaman", then such a specific extension would equally be necessary as applied to the same expression when used in Sec. 12.

Sec. 13 of the Act of 1915 establishes certain requirements as to the ~~number of~~ the deck crew who are required to have a rating of not less than A.B. and requires 75% of the crew of each department to understand any order given by the officer of such vessel. The language of this section is in the form of a prohibition, reading "that no vessel of 100 tons gross and upward, except those navigating rivers exclusively and the smaller inland lakes and except as provided in Sec. 1 of this Act, shall be permitted to depart from any port of the United States unless she has on board * * *." Here again, no specific extension is made as to foreign seamen or foreign vessels, and, in fact, the subsequent language in Section 13 which provides that,

> "Graduates of school ships approved by and conducted under rules prescribed by the Secretary of Commerce may be rated able seamen after twelve months service at sea * * *",

indicate that this section of the Act was not intended to apply to other than American vessels, since Congress certainly did not intend that all foreign seamen were to apply for licenses and certificates from the United States Department of Commerce before being qualified to ship aboard foreign vessels. This failure to provide for foreign vessels is pointed up by reference to the following section

of the Act, i.e., Sec. 14, where we find a specific application to foreign vessels leaving ports of the United States. Sec. 14 of the Act of 1915 amended Sec. 4488 of the Revised Statutes by adding thereto specific regulations as to life saving appliances, the minimum number of davits and open boats, and, among other things, for a minimum number of certified lifeboat men. This section contains the following language:

> "Provided, that foreign vessels leaving ports of the United States shall comply with the rules herein prescribed as to life saving appliances, their equipment, and the manning of same."

Here again, as was found in Sec. 4 and Sec. 11 of the Act of 1915, there is a specific provision as to the extension of the section to foreign vessels under certain stated conditions. It becomes increasingly obvious, therefore, that Congress was well aware of the fact that certain of these sections were to be applied to foreign vessels, whereas certain of them were not. Where language is found making specific reference to the application of a section to foreign vessels, then it must be concluded that such was the intent of Congress, and conversely, it must be concluded that, as to those sections where such a specific extension is omitted, it was the intent of Congress that no such extension be made. If that were not the case, then such wording would be mere surplusage and of no effect whatsoever.

Section 15 of the Act of 1915 provides that: "the owner, agent, or master of every barge which, while in tow through the open sea has sustained or caused any accident, shall be subject, in all respects to the provisions of Sections ten, eleven, twelve and thirteen of chapter three hundred and forty-four of the Statutes at Large, approved June twentieth, eighteen hundred and seventy-four," and further provides that the reports prescribed in those sections shall be transmitted by collectors of customs to the Secretary of Commerce, who shall, in turn, transmit them in summary form to Congress annually. Here again,

no specific provision is made applying the terms of this section to foreign vessels, and we should bear in mind that if such had been the intention of Congress, then the language was readily available, for, as has been noted above, such language had already been used three times in the same Act.

Sec. 16 of the Act of 1915 "requested and directed" the President to give notice to the several governments that all treaties and conventions between the United States and such governments with respect to the arrest and imprisonment of officers and seamen deserting or charged with desertion from merchant vessels of the United States in foreign ports and for the arrest and imprisonment of officers and seamen deserting or charged with desertion from merchant vessels of foreign nations in the United States be terminated upon the expiration of certain specified periods. This request was also directed to "any other treaty provision in conflict with the provisions of this Act."

The Congressional Record bears witness to the prolonged discussion and debate which the provisions of this particular section evoked. On the one hand, Senator La-Follette of Wisconsin was urging upon Congress the desirability of the termination of such treaties, whereas Senator Burton of Ohio was the leader of the faction which urged a more moderate course. In the end, Senator La-Follette had his way, for Sec. 16 as finally enacted did call for the termination of such treaties. (Congressional Record, 63rd Congress, 1st Session, Vol. 50, Part 6, pages 5761-5792.)

It is interesting to note that in spite of the urging of Senator LaFollette, from whom the Act of 1915 derives its name, the provisions of that Act were not made uniformly applicable to foreign vessels, but only certain sections thereof, and then only under certain specified conditions and situations.

Evidence of the reluctance in certain quarters of Congress to make even these specified sections applicable to

foreign vessels is to be found in the Report of the House Committee on Merchant Marine and Fisheries. In commenting and passing on the proposed Sec. 4 of the Act dealing with half wages the Report states (House Report No. 851, 63rd Congress, 2nd Session, page 18):

> "The application of this section, however, to foreign vessels raises a serious question."

And later at page 20 of the same Report:

> "It should be stated that the Committee are not unanimous in making this provision apply to foreign ships.
>
> Some members of the Committee doubt our right and the wisdom of making it apply to foreign ships and question its value to our merchant marine."

Sec. 17 of the Act of 1915 provided for the repeal of the various treaties designated in Sec. 16 upon the termination of the periods of notice required.

Sec. 18 of the Act of 1915 provided as to the time the Act was to take effect.

Sec. 19 of the Act of 1915 amended Sec. 16 of the Act of December 21, 1898, entitled "An Act to amend the laws relating to American seamen, for the protection of such seamen, and to promote commerce," by adding thereto a provision that if "any seaman" incapacitated from service by injury or illness was on board a vessel so situated that a prompt discharge requiring the personal appearance of the master of the vessel "before an American consul or consular agent was impracticable," then such seaman himself was to be sent to a consul or consular agent who was in turn directed to care for him and defray the cost of his maintenance and transportation. Here again, although the section of the Act uses the expression "any seaman", it is obvious that it refers to seamen aboard American vessels, for it refers specifically to the requirement of a personal appearance of the master of the vessel before an "American consul or consular agent".

The next and last section, Sec. 20 of the Act of 1915, was the section which sought to abolish the fellow-servant doctrine as applied to seamen, and which was superseded and amended by the passage of the Jones Act in 1920.

If we consider the Jones Act within the framework of the Merchant Marine Act of June 5, 1920, of which it was Sec. 33, we are forced to the same conclusion that the expression "any seaman" was not intended to cover foreign seamen serving on foreign vessels who were injured in foreign ports.

The Merchant Marine Act of June 5, 1920, as has been pointed out above, was "An Act To provide for the promotion and maintenance of the American Merchant Marine * * *" and as such its provisions and sections covered the following subjects: the repeal of prior legislation with respect to appropriations for the Military and Naval establishments; the repeal of prior legislation with respect to charter and freight rates and to the requisitioning of vessels by the Government; the establishment of the United States Shipping Board; authorization for the sale or charter of Government-owned vessels to citizens of the United States; further authorization with respect to the sale of other property by the United States Shipping Board; provisions for the investigatory powers of the United States Shipping Board with respect to the operation of vessels by citizens of the United States; provisions for the carrying of all mails of the United States on American-built vessels documented under the laws of the United States if practicable; provisions for a limitation of the number of passengers to be carried aboard cargo vessels documented under the laws and flag of the United States; provisions stating that no merchandise shall be transported between points in the United States on other than vessels built in and documented under the laws of the United States and owned by persons who are citizens of the United States; all the provisions of the Ship Mortgage Act of 1920; a further amendment of the prohibition against

the payment of advance wages, earlier mentioned, not amending, however, the specific provisions as to the applicability to foreign vessels within the harbors of the United States; and finally, the establishment of certain definitions as to the ownership of vessels by citizens of the United States.

In short, there is nothing in the Merchant Marine Act of June 5, 1920, calling for any application whatsoever to foreign seamen serving aboard foreign vessels in foreign ports, since the whole Act is concerned with the machinery necessary for the establishment and operation of the United States Shipping Board and the operation, supervision, sale and purchase of vessels of the United States.

The report of the Senate Committee on Commerce made the following statement with respect to the aims of the Merchant Marine Act of 1920 (Senate Report No. 573, 66th Congress, 2nd Session, p. 2):

> "No interests but American interests have been kept in view. We are sure that other nations will look after their citizens and their needs, and if our business is to be cared for, we must do it."

If we look to the wording of the Jones Act, totally aside from its context within the framework of the Acts of 1915 or 1920, further evidence is found that Congress did not intend to include within its provisions foreign seamen serving aboard foreign vessels injured in foreign ports. The closing sentence of Sec. 33 of the Merchant Marine Act of 1920 reads as follows:

> "* * * Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

The use of the word "jurisdiction" has been interpreted by this Court not to relate to the general jurisdiction of the court, but to venue only. *Panama Railroad Company v. Johnson*, 264 U. S. 375, 44 S. Ct. 391, 68 L. Ed. 748 (1924).

Even granting such an interpretation of the word "jurisdiction", however, this closing sentence of Sec. 33 makes it abundantly clear that Congress had in mind domestic employers and shipowners rather than foreign shipowners when it adopted this particular phraseology.

What foreign shipowner would be likely to reside in or have his principal office in the United States? How would a foreign seaman proceed under the language of the Jones Act if his employer, the foreign shipowner, did not live in the United States and did not have any office located in the United States?

If Congress had intended to give a remedy to the foreign seaman serving aboard a foreign vessel under the Jones Act, it could very easily have so provided by giving him an *in rem* remedy. With such a remedy available, the foreign seaman could have proceeded against the vessel upon her arrival in any United States port. It is significant that Congress did not make any such provision. A lien against the vessel is essential to every proceeding *in rem*, and no such lien arises by reason of the Jones Act in favor of an injured seaman. This Court specifically so held in *Plamals* v. *s/s Pinar Del Rio*, 277 U. S. 151, 48 S. Ct. 457, 72 L. Ed. 827 (1928).

There may be isolated instances in which the defendant employer of the foreign seaman, while having his principal office located in the foreign country, may at the same time have an office in this country so as to allow the injured foreign seaman to start an action under the Jones Act in the court of the district in which such local office is located. But if we are to impute to Congress the intent to provide for foreign seamen serving aboard foreign ships under the terms of the Jones Act in spite of its language, then we must equally be prepared to admit that by the section as presently written, Congress has given only a partial remedy, since the majority of foreign seamen would find it impossible to comply with the jurisdiction and venue requirements as presently constituted.

It has been argued by plaintiff-respondent, both in the Court of Appeals and in the brief submitted in opposition to the petition for a writ of certiorari in this Court, that the Jones Act should be applied to foreign seamen serving on foreign ships who sign on in the United States and are subsequently injured outside the territorial waters of the United States in order to close the gap alleged to exist between the operating costs of foreign and American shipowners. This argument is apparently based on a belief that such a construction would indirectly subsidize the American Merchant Marine, and that as a result the burden falling upon the United States taxpayer would be lightened.

Plaintiff-respondent ignores our national policy against indirect subsidies to shipping as shown by the Merchant Marine Act of June 29, 1936 (C. 858, 49 Stat. 1985, 46 U. S. C. § 1101), and the Congressional Reports.

Prior to the passage of the Merchant Marine Act of 1936, Congress had provided aid to American shipping in the form of lending money at low rates of interest to the American shipping companies for the purpose of building new ships for foreign trade. Congress had, in addition, appropriated large annual sums under the guise of payments for ocean-mail contracts. Plaintiff-respondent now seeks to have the court construe the Jones Act as applying to foreign seamen in order to give American shipowners an additional subsidy. However, President Roosevelt, in his Message to Congress on the Merchant Marine Act of 1936, dated March 4, 1935, in speaking of the difference between the ocean-mail payments actually made and the reasonable cost of such service, stated (74th Congress, House Document No. 118, p. 2):

> "The difference, $27,000,000, is a subsidy, and nothing but a subsidy. But given under this disguised form it is an unsatisfactory and not an honest way of providing the aid that Government ought to give to shipping.
>
> *I propose that we end this subterfuge.* If the Congress decides that it will maintain a reasonably ade-

quate American Merchant Marine I believe that it can well afford honestly to call a subsidy by its right name." (Emphasis supplied.)

More recent evidence of the policy of our government to avoid the indirect subsidy is found in President Truman's request made in August, 1952, to the Secretaries of Commerce and the Treasury to prepare reports on the existing law offering tax deferments on shipping earnings as an added inducement to the setting aside of funds for new construction. President Truman asked for a plan to abrogate these tax benefits and establish some other financial assistance in the form of a direct subsidy.

It is submitted, that for the courts of the United States to attempt to reduce the burden of the United States taxpayer by subjecting foreign shipowners to higher insurance rates for personal injury coverage would be to resort to that very form of "subterfuge" which the Merchant Marine Act of 1936 was explicitly designed to avoid. The decisions of our courts have no place within this province.

According to present policy, foreign as well as United States vessels are subject to regulation by multilateral Conventions or treaties, rather than by unilateral legislation. The most recent example was the International Convention for Safety of Life at Sea, 1948, held in London. This Convention was signed in London on June 10, 1948, by the respective plenipotentiaries of the government of the United States and the governments of 27 other countries. The provisions of the Convention were submitted to the Senate on January 13, 1949, and were ratified without amendment or exception on April 20, 1949 (Congressional Record, 81st Congress, 1st Session, Vol. 95, Part 4, pages 4822-4825). Subsequently, on November 19, 1951, the fifteenth country deposited its ratification (Denmark was one of the fifteen) and the Convention thereby came into force on November 19, 1952. President Truman, by proclamation dated September 10, 1952, proclaimed that the Convention was to be observed and fulfilled with good

faith by the United States on and after November 19, 1952.

This Convention provides, in brief, for all vessels to obtain from their own countries certificates of compliance with the requirements of the Convention with respect to: life saving equipment, watertight bulkheads, double bottoms, load lines, stability tests, log entries, safety of electrical installations, fire protection and patrols, radio installations and the carriage of dangerous cargoes. Also promulgated were uniform regulations for preventing collisions at sea. The full text of the Convention is not yet officially reported in the United States Statutes at Large, but can be read in Department of State Publication 3282, International Organization and Conference Series I, 6.

According to plaintiff-respondent's principles of statutory construction, the same result should have been reached by extending American inspection statutes to cover all ships trading to the United States. That Congress and the President acted through the Convention is proof positive of our present policy to steer clear of applying United States statute law to foreign vessels, but to accomplish the same aims through multilateral action calling for consent by all concerned.

Counsel for plaintiff-respondent has stressed the alleged inequality existing between American and foreign seamen, and urges that the Jones Act should be applied since it is more liberal to the seamen.

Those are not valid arguments for applying the Jones Act to the factual situation herein. The real question is whether the Jones Act was by its terms intended to be applicable to a foreign seaman, who is injured in a foreign port after signing-on a foreign vessel in a United States port, when that seaman recovered the benefits to which he was entitled under the law of the flag.

Having examined the wording of the Jones Act, both within the framework of the Act of 1915, to which it was an amendment and within the framework of the Merchant Marine Act of 1920, in which it was enacted, we return to the question: Does "any seaman" as used in the Jones Act,

mean foreign seamen serving aboard foreign vessels who are injured in foreign ports aboard those vessels?

Certainly the provisions of the Acts would not so indicate, for when Congress intended any particular section to apply to other than United States vessels, a specific provision was invariably included, and as a result, no guesswork is required to determine what sections of the Acts are limited to United States vessels and what sections of the Acts are to be further extended so as to apply as well to foreign vessels under specified conditions.

Sec. 11 of the Act of 1915 which prohibited the payment of advance wages also used the expression "any seaman" in defining its applicability, but Congress did not feel that that alone was sufficient to extend to other than United States vessels, because sub-section (e) of that Sec. 11 called for specific application "to foreign vessels while in waters of the United States." If Congress had intended the Jones Act to apply as well to foreign vessels, then why was such a specific extension not included within its terms?

As stated by this Court in *Sandberg* v. *MacDonald*, at 248 U. S. 195, with respect to application of Sec. 11 to foreign vessels while in other than United States ports:

> "Had Congress intended to make void such contracts and payments, a few words would have stated that intention, not leaving such an important regulation to be gathered from implication."

## POINT II

**The Jones Act is not applicable to this action, since the action sounds in tort and seeks a recovery for a negligent act committed outside the territorial waters of the United States and must be governed by the law of the site of such negligent act.**

In this action a Danish seaman seeks recovery under the Jones Act for injuries sustained aboard the s/s Randa,

a Danish vessel, while the vessel was in Havana, Cuba (pre-trial order, 16, 33-34). The plaintiff was injured on October 7, 1946, when he fell from the top of No. 1 hatch into the hold while engaged in inserting hatch boards with a fellow seaman (33-34). Two and one-half months earlier, on July 25, 1946, Larsen, a Danish citizen and resident of Denmark who was temporarily in New York City, signed articles to serve aboard the s/s Randa (pre-trial order, 16, 44, Defendant's Exhibit A, 45). The articles stated that each member of the ship's crew was employed "on the basis of the regulations contained in the (Danish) Seaman's Law" as well as in accordance with the provisions set forth opposite each of their signatures (Defendant's Exhibit A, 44, 45, middle of first page, directly above horizontal line, also second page, column 15).[1] It is submitted that the basis for the recovery sought against J. Lauritzen, the shipowner, is the alleged liability of that shipowner for the tortious conduct of a fellow-seaman of the plaintiff, and that the extent and consequences of this liability must be governed by the law of the place of the injury, the Danish law, which was both the law of the site of the tort and the law to which Larsen subscribed at the time he signed shipping articles on July 25, 1946.

The Jones Act states in part:

> "That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; * * *."

The Federal Employers' Liability Act of 1908, C. 149, 35 Stat. 65, Title 45, U. S. Code § 51, was thus incorporated into the Jones Act. Sec. 1 of the Federal Employers' Liability Act provides:

> "Every common carrier by railroad while engaging in [interstate] commerce * * * shall be liable in dam-

[1] See stipulation of parties on English translation of portions of Defendant's Exhibit A, filed in this Court November 24, 1952.

> ages to any person suffering injury while he is employed by such carrier in such commerce, * * * for such injury resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier * * *."

The fundamental elements required for a recovery under the Jones Act are, therefore, an act of negligence by an officer, agent, or employee of the employer and a resulting injury by an employee. The vital element is negligence. Without negligence there can be no recovery. This is not a compensation statute coupled with a contractual relationship. The Jones Act establishes the machinery for a recovery based on tort against the employer.

The necessity for negligence as the basis for a recovery under the Jones Act and affirmation that liability thereunder sounds in tort is found in the decision of this Court in *Jamison* v. *Encarnacion,* 281 U. S. 635, 50 S. Ct. 440, 74 L. Ed. 1082 (1930). This was an action brought by a longshoreman against an employing stevedore to recover for damages for personal injuries sustained while a member of a crew loading a barge lying in navigable waters of the United States in Brooklyn, New York. Mr. Justice Butler wrote as follows at 281 U. S. 639 with respect to plaintiff's recovery:

> "Plaintiff was a seaman within the meaning of § 33 (*International Stevedoring Co.* v. *Haverty, supra*) and, as he sustained the injuries complained of while loading a vessel in navigable waters, the case is governed by the maritime law as modified by the Acts of Congress above referred to. *Northern Coal Co.* v. *Strand,* 278 U. S. 142. *Panama R. R. Co.* v. *Johnson,* 264 U. S. 375. He is entitled to recover if within the meaning of § 1 his injuries resulted from the negligence of the foreman."

And then later at pages 640-641:

> "As the Federal Employers' Liability Act does not create liability without fault (*Seaboard Air Line* v. *Horton,* 233 U. S. 492, 501), it may reasonably be con-

strued in contrast with proposals and enactments to make employers liable in the absence of any tortious act, for the payment of compensation for personal injuries or death of employees arising in the course of their employment."

In *Cortes* v. *Baltimore Insular Line*, 287 U. S. 367, 53 S. Ct. 173, 77 L. Ed. 368 (1932), this Court considered the question of the liability of an American shipowner for an injury sustained by a seaman aboard its vessel in the course of his employment, resulting from the failure of the master of the ship to furnish him care and cure when the seaman was stricken with pneumonia. In discussing the question of whether a right of action was given to the personal representative if the injury resulted in death, Mr. Justice Cardozo made it clear that he considered the liability to be one in tort when he wrote as follows at 287 U. S. 374:

> "* * * Here performance was begun when the vessel started on her voyage with Santiago aboard and with care and cure cut off from him unless furnished by officers or crew. From that time forth withdrawal was impossible and abandonment a tort. Given a relation involving in its existence a duty of care irrespective of a contract, a tort may result as well from acts of omission as of commission in the fulfilment of the duty thus recognized by law. * * * "

An essential element of the tort, i.e., negligence, thus occurred at the port of departure, and the site of the tort was the American flag vessel on a coastwise voyage (287 U. S. 370).

Further support for the contention that recovery under the Jones Act for an injury suffered by reason of the negligence of a fellow servant, is a recovery for a tort and should be governed by the law of the place where such tort occurred is found in *New York Central R. R. Co.* v. *Chisholm*, 268 U. S. 29, 45 S. Ct. 402, 69 L. Ed. 828 (1925), where this Court considered the applicability of the Federal Employers' Liability Act to an injury sustained by an

employee of an American railroad while operating in Canada. This decision is properly in point, since the Jones Act, as has been pointed out, absorbed within its framework the United States statutes modifying or extending the common law, right or remedy in cases of personal injury to railway employees. This Court, in an opinion by Mr. Justice McReynolds, denied a recovery under the Federal Employers' Liability Act to the administrator of the deceased employee of the railroad who was fatally injured in Canada, and made it clear that the recovery, if anything, was a tort recovery in the following terms at 268 U. S. 31:

> "The statute under consideration lacks the essential characteristics of those, now very common, which provide for compensation to employees injured in the line of duty irrespective of the master's fault. It only undertakes to impose liability for negligence which must be shown by proof (*Southern Ry.* v. *Gray*, 241 U. S. 333, 339; *New York Central R.R.* v. *Winfield*, 244 U. S. 147, 150), and demands under it are based wholly upon tort."

This decision interprets the very form of recovery with which we are presently concerned and holds that the statute deals with a tort rather than a contract remedy. It is not to be applied extraterritorially, for Mr. Justice McReynolds stated that, upon a construction of the Act, the action would not lie, since:

> "The carrier was subject only to such obligations as were imposed by the laws and statutes of the country where the alleged act of negligence occurred; and the administrator could not rely upon any others" (32).

*New York Central R. R. Co.* v. *Chisholm*, *supra*, presented a situation even more striking than the one at hand, since the plaintiff's decedent had not only been employed in the United States, but was also a citizen of the United States and primarily domestically employed. The holding of this Court was that there could be no right of action based upon the Federal Employers' Liability Act when the

site of the alleged act of negligence was outside the United States. Since such has been the holding of this Court, there would seem to be no grounds upon which the application of the Jones Act, which made the same provision for a recovery for acts of negligence, could be extended to include therein acts in a foreign port resulting in an injury to a foreign seaman serving aboard a foreign ship.

Some argument has been made that the decision of this Court in *New York Central R. R. Co.* v. *Chisholm, supra,* has been impaired by the later decision of this Court in *Cortes* v. *Baltimore Insular Line, supra.* This argument was apparently based on the statement in the latter case at 287 U. S. 377 that:

> "We do not read the act for the relief of seamen as expressing the will of Congress that only the same defaults imposing liability upon carriers by rail shall impose liability upon carriers by water."

Any distinction which Mr. Justice Cardozo pointed out in his decision in *Cortes* v. *Baltimore Insular Line, supra,* when read in context, however, related only to a question of what constituted negligence towards an employee on the part of a shipowner as against what constituted negligence towards an employee on the part of a railroad. No distinction was made as to the necessity for a showing of negligence, and no distinction was made as to the nature of the recovery or the site of the tort. This is pointed up at page 377 of 287 U. S. by considerable discussion of the responsibility of a railroad to rescue an employee who has fallen from a locomotive, as against the liability of the shipowner to rescue a seaman who has fallen into the ocean. *New York Central R. R. Co.* v. *Chisholm, supra,* involved a question of the applicability of the Federal Employers' Liability Act to an extraterritorial tort involving a man who had been employed in the United States by a United States railroad. *Cortes* v. *Baltimore Insular Line, supra,* required no jurisdictional discussion whatsoever, involving, as it did, a tort committed aboard an American

vessel (52 F. (2d) 22) on a coastwise voyage (287 U. S. 370). The *Cortes* decision hinged upon whether the failures to act on the part of the shipowner and its employees constituted negligence so that a tort resulted, not whether the Jones Act or the Federal Employers' Liability Act should be given extraterritorial effect.

The reasons for these holdings, that the liability for a tort should be governed by the laws of the place where that tort occurred, are set forth in the decisions of this Court in *Slater* v. *Mexican National R. R. Co.*, 194 U. S. 120, 24 S. Ct. 581, 48 L. Ed. 900 (1903) and *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 29 S. Ct. 511, 53 L. Ed. 826 (1909).

*Slater* v. *Mexican National R. R. Co.*, supra, involved an action brought in the United States Circuit Court for the Northern District of Texas by the widow of the deceased, a citizen of Texas residing in Laredo, who was employed by a Colorado corporation owning and operating a railroad running from Laredo to Mexico City. The deceased was fatally injured through the negligence of this corporation while working in its yard in Mexico just across the Rio Grande River. The action was to recover damages for his death. This Court affirmed the decree of the Circuit Court of Appeals wherein the action was ordered to be dismissed, and Mr. Justice Holmes wrote as follows at 194 U. S. 126 with respect to the enforcement in the United States of the cause of action for the deceased's death in Mexico:

> "But when such a liability is enforced in a jurisdiction foreign to the place of the wrongful act, obviously that does not mean that the act in any degree is subject to the *lex fori*, with regard to either its quality or its consequences. On the other hand, it equally little means that the law of the place of the act is operative outside of its own territory. The theory of the foreign suit is that although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an *obligatio*, which, like other obligations, follows the person, and may be

enforced wherever the person may be found. *Stout* v. *Wood*, 1 Blackf. (Ind.) 71; *Dennick* v. *Railroad Co.*, 103 U. S. 11, 18. But as the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation, *Smith* v. *Condry*, 1 How. 28, but equally determines its extent."

*American Banana Co.* v. *United Fruit Co.*, supra, was an action brought to recover damages under the Sherman Anti-Trust Law of July 2, 1890, C. 647, 26 Stat. 209, as a result of the plaintiff's and the defendant's operations in Costa Rica. With respect to plaintiff's allegation that a wrongful conspiracy resulted in driving it out of business, Mr. Justice Holmes wrote as follows at 213 U. S. 355:

"It is obvious that, however stated, the plaintiff's case depends on several rather startling propositions. In the first place the acts causing the damage were done, so far as appears, outside the jurisdiction of the United States and within that of other states. It is surprising to hear it argued that they were governed by the act of Congress."

Then, in rejecting the plaintiff's theory, Mr. Justice Holmes followed at page 356 by explaining the reasons for applying the law of the place of the tort:

"But the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done. *Slater* v. *Mexican National R. R. Co.*, 194 U. S. 120, 126. This principle was carried to an extreme in *Milliken* v. *Pratt*, 125 Massachusetts, 374. For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent."

The tort involved in the instant case occurred aboard the Danish vessel while it was moored in Havana, Cuba. There has been no contention made that the tort occurred anywhere else. There is no claim that the tort occurred in the United States.

What, then, is the connection between the happenings aboard the S/S Randa in Havana, Cuba, on October 7, 1946, which should require the application of an American statute? The only connection is the purely fortuitous circumstance that two and one-half months earlier the plaintiff-respondent, a Danish citizen and a resident of Denmark, was temporarily in New York City and signed articles on the Danish form to serve aboard the S/S Randa as an A. B. for a voyage to South America and other places (pretrial order, 16, 44, Defendant's Exhibit A, 44, 45). The articles signed by the plaintiff-respondent bound him to serve aboard the vessel for an indefinite period with the right to leave the vessel on seven days' notice, the owner having a similar right to discharge Larsen on seven days' notice (47).

In answer to any contention that the eventual return of the S/S Randa to New York had any significance, this Court's attention is called to the exchange between the Trial Judge and counsel for the plaintiff-respondent as recorded at pages 48 and 49 of the record, where the Trial Judge indicated that the wording of the pre-trial order did not deal with "scope of the voyage" but merely stated the fact that the vessel finally got to New York.

If the decision of the Court of Appeals in the instant case is to stand as a correct enunciation of a principle of American law, then the result will be that a circumstance, causally unrelated to the occurrence of the tort will disrupt the established principles of the conflict of laws and make the site of the tort totally irrelevant with respect to the remedy available.

Application of the law of the site of the tort will bring about uniformity of remedy, and it is this uniformity

which has caused courts the world over to recognize and develop this basic principle. It would seem desirable that foreign seamen, signing articles drawn in accordance with the law of their own nationality and the law of the flag of the vessel, should be compensated equally for injuries occurring aboard that vessel, and that their recovery should be measured in accordance with the economic and social standards of their common country, regardless of the fact that one of them may have signed articles on the Danish form in the United States, whereas the other may have signed similar articles in a foreign port.

If two alien seamen aboard a foreign vessel should sustain simultaneous injuries aboard that vessel due to the same negligent cause, then under the rulings of the Court of Appeals, the one who signed articles in other than a United States port would be entitled to the benefits of the foreign law, the law of the place of the tort, and could not proceed under the Jones Act, whereas the one who signed on in a United States port would be entitled to recover under the terms of the law of the place of the tort and could, in addition, proceed in the courts of the United States under the Jones Act. This difference in the nature of and the amount of the remedy available to these two seamen would all be attributable to the purely fortuitous circumstance that one of them was temporarily in the United States at the time he joined the vessel, whereas the other was not. Yet these two men signed the same articles, agreed to be bound by the same terms, were subject to the same discipline, and in every way lived the same lives and were exposed to the same hazards.

To give effect to the holding of the Court of Appeals in this case is to open the door to inequality of treatment aboard a single vessel almost unlimited in its possibilities.

## POINT III

**Matters arising between a foreign shipowner and a foreign seaman aboard a foreign vessel beyond the continental limits of the United States which affect only the internal economy and discipline of the vessel should be governed by the law of the flag in accordance with accepted law and custom.**

This action is one by a Danish seaman against the Danish owners of a Danish ship to recover for injuries sustained aboard that Danish ship while moored in Havana, Cuba. Two and one-half months before the date of the injury, the seaman had signed articles on the Danish form in New York (Defendant's Exhibit A, 44, 45), calling for a voyage to "South America and further" (pre-trial order, 16). As shown in the statement of facts herein, the Danish seaman recovered from the Danish shipowner all the benefits to which he was entitled by the terms of the articles which he signed. These benefits consisted of all necessary hospitalization expenses in Havana (pre-trial order, 16, 35, 49), free transportation from Havana to New York (pre-trial order, 16, 37), free hospitalization at the United States Marine Hospital on Ellis Island (pre-trial order, 16, 37, 49), free out-patient treatment at the Long Island College Hospital (pre-trial order, 16, 39, 49), maintenance and subsistence from December 10, 1946, the date he was discharged from the United States Marine Hospital at Ellis Island, until Dec. 30, 1946 (90). During the course of the medical treatment in New York, the petitioner offered the plaintiff-respondent free transportation to Denmark for such further treatment as might be necessary, but this offer was refused (50). In addition, the plaintiff-respondent received all wages due him up to the date of the accident (pre-trial order, 16, 39), and also received the seven days' wages to which he was entitled under the Danish Maritime Law (39-40, Defendant's Exhibit D, 90-92).

As has been pointed out, the articles which were signed by the plaintiff-respondent in New York to serve aboard

the Danish vessel stated that each crew member, including the plaintiff-respondent, was employed in accordance with, and subject to the provisions set forth in the Danish Seamen's Law (Defendant's Exhibit A, 44, 45),[1] and since the plaintiff-respondent was fully able to read Danish (46), there can be no question raised as to his understanding of the conditions of his employment.

There is nothing in the record to indicate the extent of the voyage for which the plaintiff-respondent signed on beyond the terms of the articles which called for a voyage to "South America and other places". It has been contended from time to time during the course of this proceeding, and most recently on page 2 of plaintiff-respondent's brief in opposition to the petition for a writ of certiorari, that these articles were invalid by reason of the indefinite nature of their terms. It should be pointed out, however, that foreign articles have never been held void by our courts. While articles such as were signed here would, according to plaintiff-respondent, be invalid as applied to an American crew signing on an American vessel in American waters, still, it has never been contended that the statutes relating to the form of articles should apply to foreign vessels, such as the s/s Randa, signing on foreign seamen in American ports. No cases or authorities have been cited to show that articles, such as were signed here are void, which is some proof in itself that the policy of Congress and our courts has been that American statutes are not to be construed to apply to the internal affairs of foreign vessels in the absence of a definite expression of that purpose from Congress. It is a recognition of the fact that there are certain matters which should more properly be left to be dealt with by the provisions of the law of the flag of the vessel.

It is submitted that on the facts of this case the liability of the petitioner, the Danish employer to the Danish seaman, should likewise be governed by the law of the

[1] See stipulation of parties on English translation of portions of Defendant's Exhibit A, filed in this Court November 24, 1952.

flag, the law of Denmark, since a matter arising between a Danish shipowner and a Danish seaman on board a Danish ship in a foreign port is, as to the United States, a matter relating purely to the internal economy or discipline of that vessel.

The criterion to be used in determining whether to apply the law of the port or the law of the flag with respect to events occurring aboard a foreign vessel was enunciated by the Supreme Court of the United States in 1887 in *Wildenhus's Case,* 120 U. S. 1, 7 S. Ct. 385, 30 L. Ed. 565. This involved the question of jurisdiction over an altercation between two Belgian seamen aboard a Belgian vessel, moored in Jersey City, New Jersey. As a result of the affray, one of the Belgians sustained a mortal wound, from which he afterwards died. Mr. Chief Justice Waite delivered the opinion of the Court and pointed out that under the law of civilized nations a merchant vessel of one country entering the port of another for the purposes of trade, normally subjected itself to the law of the place where it went, so that it owed temporary and local allegiance to the jurisdiction of the country. As to this general principle, however, he was careful to draw a distinction between internal discipline, rights and duties of the crew towards the vessel, all of which, he said, should be governed by the law of the flag, and, on the other hand, those matters which would affect the peace or dignity of the port, and drew this distinction in the following language (at page 12):

> "From experience, however, it was found long ago that it would be beneficial to commerce if the local government would abstain from interfering with the internal discipline of the ship, and the general regulation of the rights and duties of the officers and crew towards the vessel or among themselves. And so by comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquillity of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel

belonged as the laws of that nation or the interests of its commerce should require. But if crimes are committed on board of a character to disturb the peace and tranquillity of the country to which the vessel has been brought, the offenders have never by comity or usage been entitled to any exemption from the operation of the local laws for their punishment, if the local tribunals see fit to assert their authority."

This same principle was again enunciated by this Court in *United States* v. *Rodgers*, 150 U. S. 249, 14 S. Ct. 109, 37 L. Ed. 1071 (1893). Here it was held in an opinion by Mr. Justice Field that the courts of the United States had jurisdiction to try a person for an assault with a dangerous weapon, committed on a vessel belonging to a United States citizen, when that vessel was in the Detroit River, outside the jurisdiction of any particular state, but within the territorial limits of the Dominion of Canada. In so holding, Mr. Justice Field pointed out that the jurisdiction of a nation over a vessel belonging to it, while lying in the port of another nation, was not necessarily wholly exclusive, but in defining the limits of the exemption from local law, he wrote as follows (at p. 265):

"But, nevertheless, the law of nations, as I have stated it, and the statutes of governments founded on that law, as I have referred to them, show that enlightened nations, in modern times, do clearly hold that the jurisdiction and laws of a nation accompany her ships not only over the high seas, but into ports and harbors, or wheresoever else they may be water-borne, for the general purpose of governing and regulating the rights, duties, and obligations of those on board thereof, and that, to the extent of the exercise of this jurisdiction, they are considered as parts of the territory of the nation herself."

Earlier at page 260 Mr. Justice Field wrote:

"The general rule is that the country to which the vessel belongs will exercise jurisdiction over all matters affecting the vessel or those belonging to her, with-

out interference of the local government, unless they involve its peace, dignity, or tranquillity, in which case it may assert its authority."

A similar situation is found in *Grand Trunk Ry. Co.* v. *Wright*, 21 F. (2d) 814 (6th Cir., 1927), aff'd 278 U. S. 577, 73 L. Ed. 516, 49 S. Ct. 176. This involved an injury resulting in death suffered by an employee on board a train ferry in American territorial waters, the ferry being of American registry, but having been chartered to defendant railroad, a Canadian corporation. The Court declared that the liability asserted rested upon the relationship of master and servant between a Canadian corporation and a Canadian resident, and was to be performed under the supervision of the defendant's corporate officers in Canada or in adjacent international waters. The Court held that the negligence involved was incidental to the internal discipline and management of the boat and that the Canadian Death Act was applicable rather than the Michigan Death Act or the Federal Employers' Liability Act, even though the act of negligence had taken place in United States waters.

It is submitted that the liability of the petitioner towards Larsen for the accident occurring aboard the Danish vessel S. S. Randa while in the port of Havana, Cuba, related only to the "internal economy and discipline" of the vessel, and for that reason should be governed by the law of the flag and should not call for the extraterritorial application of the statutes of the United States just because the articles signed by Larsen were entered into in New York. The only connection between the United States and the facts of this case is that Larsen was temporarily in New York at the time he signed aboard the vessel. That this fortuitous circumstance should entitle him to proceed in the United States Courts to recover from the Danish shipowner for an injury in Havana, Cuba, is to stretch extraterritorial application of our statutes to the breaking point.

Support for the contention of the petitioner that the "law of the flag" doctrine is still very much alive, can be found in *Kyriakos* v. *Goulandris*, 151 F. 2d 132, 1945 AMC 439 (2 Cir. 1945) and *Taylor* v. *Atlantic Maritime Co.*, 179 F. 2d 597 1950 AMC 352 (2 Cir. 1950), cert. den. 341 U. S. 915, 71 S. Ct. 736, the very two cases relied upon by the Court of Appeals for the 2nd Circuit in affirming the judgment of the Trial Court herein. In *Kyriakos* v. *Goulandris*, supra, Kyriakos, a Greek seaman who signed on a Greek vessel then in the United States, for a voyage to England and back to the United States, sought recovery for injuries sustained ashore at the hands of a fellow crew member while the vessel was in the port of Fernandina, Florida. In the majority decision Judge Augustus Hand set forth the rule as follows (at page 138):

> "It is true that in the absence of any statute, liability for a tort committed on board a vessel while the vessel is in the territorial waters of a state is determined, if it affects only the internal economy or discipline of the vessel, by the law of the state whose flag the vessel flies. American Law Institute Conflict of Laws § 405."

That this was the accepted rule in the Second Circuit as to matters relating to the internal economy or discipline of the vessels, finds further support in the dissenting opinion of Judge Learned Hand, when he stated at the beginning of his opinion (at page 139):

> "As my brothers agree, it is generally accepted law that in all matters relating to 'the internal economy or discipline' of a ship 'the law of the flag' controls. I have gathered in the margin * a number of decisions

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* "*The Scotland*, 105 U. S. 24, 26 L. Ed. 1001; *The Belgenland*, 114 U. S. 355, 5 S. Ct. 860, 29 L. Ed. 152; *United States* v. *Rodgers*, 150 U. S. 249, 14 S. Ct. 109, 37 L. Ed. 1071; *Cunard S.S. Co.* v. *Mellon*, 262 U. S. 100, 43 S. Ct. 504, 67 L. Ed. 894, 27 A. L. R. 1306; *Thompson Towing & Wrecking Association* v. *McGregor*, 6 Cir., 207 F. 209, 217-219; *Rainey* v. *New York & P. S.S. Co.*, 9 Cir., 216 F. 449, 454, L. R. A. 1916A, 1149; *The Hanna Nielsen*, 2 Cir., 273 F. 171; *Grand Trunk R. Co.* v. *Wright*, 6 Cir., 21 F. (2d) 814; *Cain* v. *Alpha S.S. Corp.*, 2 Cir., 35 F. (2d) 717."

which invoke this principle in varying applications; nobody disputes it; and it seems to me most undesirable, except for some pressing reason of domestic policy, to disregard it. It is a hardship to owners, and it may be to seamen, to have their legal relations depend upon the accident of the port of call at which the ship puts in; it is impossible to adjust affairs to constantly shifting standards, some of which will favor one party, some another. Moreover—and this, I think, we should treat most seriously—it must often be irritating to the state of the flag for the state of a port of call to insist that its own notions of what is just between owner and crew shall supersede those satisfactory to the first state."

In *Taylor* v. *Atlantic Maritime Co.*, supra, Taylor, a Panamanian citizen, sought recovery for aggravation of tuberculosis sustained aboard the s/s Atlantic Air, from the Panamanian shipowner, Taylor having signed articles in Norfolk, Virginia. Both this case and the *Kyriakos* case will be discussed more fully under Point IV of this brief. In the *Taylor* case Judge Learned Hand delivered the opinion of the Court and set forth the rule in the following terms (page 598):

"Under the ordinary convention, if a seaman is injured on the high seas, his rights are the same as though he had been injured within the country of the ship's flag;[7] unless the owner be American.[8]"

As to the use of the terms "It is true that in the absence of any statute," in *Kyriakos* v. *Goulandris, supra,* and "Under the ordinary convention," in *Taylor* v. *Atlantic Maritime Co., supra,* it has been indicated above under Point I that Section 33 of the Merchant Marine Act of 1920, known as the Jones Act, does not make the provisions of that section applicable to foreign seamen serving aboard foreign ships who are injured outside United States waters.

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[7] "*The Hamilton*, 207 U. S. 398, 28 S. Ct. 133, 52 L. Ed. 264; *Cunard S.S. Co.* v. *Mellon*, 262 U. S. 100, 123, 43 S. Ct. 504, 67 L. Ed. 894, 27 A. L. R. 1306."

[8] "*Gerradin* v. *United Fruit Co.*, 2 Cir., 60 F. 927."

In *Sonnesen* v. *Panama Transport Co.*, 298 N. Y. 268, 82 N. E. (2d) 569 (1948) cert. den. 337 U. S. 919, 69 S. Ct. 1157, Sonnesen, a Danish seaman, sought to recover under the Jones Act from the Panamanian owner for aggravation of tuberculosis based on the fact that he had signed articles in New York. In denying the plaintiff recovery under the Jones Act, Judge Desmond, in a unanimous opinion, wrote as follows (p. 267):

> "The general rule of maritime law is that tort liability on the high seas is determined by the law of the flag (*O'Neill* v. *Cunard White Star*, 160 F. 2d 446; see *Resigno* v. *Jarka Co.*, 248 N. Y. 225, 230; Robinson on Admiralty, pp. 238-239), which, in this case, is the law of Panama."

The opinion of Judge Learned Hand in *O'Neill* v. *Cunard White Star, Ltd.*, 160 F. (2d) 446, 1947 A. M. C. 505 (2 Cir., 1947), is extremely significant on this point. It should be noted that Judge Learned Hand wrote this opinion after he had been overruled by the majority in *Kyriakos* v. *Goulandris, supra,* but before he wrote the opinion in *Taylor* v. *Atlantic Maritime Co., supra.* In this case the Court denied Jones Act relief to the administratrix of a British seaman injured on the high seas, the seaman having signed articles in Britain to serve aboard a British vessel—this, even though the deceased had been a long-time resident of the United States. Judge Learned Hand discussed the holdings of the prior cases (including the *Kyriakos* case) in the same Court on the question of the application of the Jones Act to foreign seamen serving aboard foreign vessels and wrote as follows (at page 448):

> "The three decisions we have mentioned do not help us to decide whether we should now hold that the Jones Act interposes to change what would otherwise be the rights and duties of the parties, because *in all three the act or omission was within our waters.* In each the question was whether an act of Congress, at least literally applicable to the situation, should yield to the doctrine that so far as concerns the 'in-

ternal economy' of a foreign ship, the law of the flag applies while she is in a foreign port * * *. In the case at bar the situation is just reversed: we are to say, not when the Jones Act should give place to the law of the flag, but *when the law of the flag should give place to the Jones Act in places where the Jones Act does not expressly apply.*" (Emphasis supplied.)

After writing this opinion in *O'Neill* v. *Cunard White Star Line, Ltd., supra*, in which he held that there was nothing in the language of the Jones Act to indicate that it was to be applied to injuries occurring on the high seas, Judge Learned Hand followed, in 1950, with the opinion in *Taylor* v. *Atlantic Maritime Co., supra*. In discussing, in the latter case, the law of the flag, the Jones Act and foreign seamen, Judge Learned Hand wrote as follows (at page 598):

> "When a seaman signs articles in a foreign port for service on an American ship, and is injured on the high seas, there is no embarrassment, whether one regards the claim as sounding in tort, or in contract. So far as it sounds in tort, it depends upon American law—the law of the flag—; so far as it sounds in contract, although the law of the place where the contract is made will ordinarily apply, it is a well-recognized exception that in all that concerns the 'internal economy' of the ship the law of the flag controls.[9]"

Judge Hand has stated, in effect, that the seaman who signed on an American vessel in a foreign port will be governed by the law of the flag if his claim sounds in tort, and that if his claim sounds in contract, an exception to

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[9] "*The Scotland*, 105 U. S. 24, 26 L. Ed. 1001; *The Belgenland*, 114 U. S. 355, 5 S. Ct. 860, 29 L. Ed. 152; *United States* v. *Rodgers*, 150 U. S. 249, 14 S. Ct. 109, 37 L. Ed. 1071; *Cunard S.S. Co.* v. *Mellon*, 262 U. S. 100, 43 S. Ct. 504, 67 L. Ed. 894, 27 A. L. R. 1306; *Thompson Towing & Wrecking Ass'n* v. *McGregor*, 6 Cir., 207 F. 209; *Rainey* v. *New York & P. S.S. Co.*, 9 Cir., 216 F. 449, L. R. A. 1916A, 1149; *The Hanna Nielsen*, 2 Cir., 273 F. 171; *Grand Trunk R. Co.* v. *Wright*, 6 Cir., 21 F. 2d 814; *Cain* v. *Alpha S.S. Corp.*, 2 Cir., 35 F. 2d 717."

the law of the place where the contract was made will still cause the law of the flag—that is, American law—to apply. Logically, it should follow, if the same rule were applied to a foreign seaman signing on a foreign ship in a United States port, that if the claim sounds in tort, the law of the foreign flag will apply, and if the claim sounds in contract, that same exception to the law of contract should apply and the law of the flag—the foreign law—should be applied to that claim.

That is the substance of petitioner's argument—i.e., that as to matters within the "internal economy" of the vessel, the law of the flag and the law of the place of the injury predominate over the law of the place where the hiring contract was made.

The question of local interference in domestic affairs of vessels engaged in international trade is a two-way street. If we are to concede that the internal affairs of a foreign vessel outside a United States port are to be governed by United States law, then we must be prepared to admit that our own vessels may also be subject to local interference at every foreign port of call.

If the decision of the United States Court of Appeals is affirmed, it will be tantamount to the decision of a major maritime power to abandon this basic conflict of laws rule for maritime cases and as such it is certain to have repercussions in the policies and laws of other countries. If the country in which a foreign seaman signs articles to serve aboard a foreign ship insists upon applying its own domestic law to torts occurring in any part of the world, there will undoubtedly follow considerable pressure on the part of other governments to apply to American vessels calling at their ports, their concept of the social benefits to which they deem a seaman to be entitled.

The entire framework upon which international trade has been built will have been abrogated, in that the internal affairs of a ship will no longer remain subject to the laws of the country whose flag that vessel flies.

It is not contended on behalf of the petitioner that the law of the flag is a sacred doctrine superior to the law of our land in all instances as might perhaps be supposed. It is urged, however, that whenever there is a conflict between the law of the flag and the law of the forum, the determination as to which shall be paramount, hinges upon whether the matter involves the internal rights and duties of the crew towards the vessel, or whether it is a matter which so affects the peace and tranquillity of the forum as to require the application of the law of that forum.

If the decision of the Court of Appeals for the Second Circuit in the present case is deemed to remove inequality among seamen, as has been urged from time to time on behalf of plaintiff-respondent, it certainly will have the very opposite effect, and will result in discriminatory treatment among Danish seamen on board Danish vessels. The discriminatory treatment would result from the fact that, although all the seamen on board signed and subscribed to the same form of articles, those who signed on in the United States would, under the ruling of the Court of Appeals, have the double protection of the Danish law and of the Jones Act, whereas Danish seamen signing on in a foreign port would only have the protection of the Danish laws.

With the collapse of the international principle that the internal affairs of a ship are to be subject only to the laws of one country, other countries would no doubt follow by imposing their notions regarding proper working conditions and proper terms as to those seamen signing on in their ports, regardless of the nationality of the seamen or the nationality of the vessels. As a result, it is not hard to foresee that a shipowner may be faced with many different standards of liability and responsibility towards the seamen on his vessel, even though all such seamen might be of the same nationality as the vessel. The trend towards regulation of international shipping by treaties and conventions rather than by such unilateral legislation stems

directly from a realization of the impossibility of complying with such varying standards.

This accepted doctrine, that the law of the flag should apply as to those matters within the internal economy and discipline of a ship has been fostered and clung to as the only practical solution for vessels engaged in international trade, who, in the course of a single year, may call at dozens of different ports. Application of the law of the flag to such matters lends a certainty and uniformity which is essential both for the operation of the ship and for the security and welfare of the members of the crew.

With respect to the facts herein, that is, a Danish shipowner operating a Danish vessel in international trade, who may be required to hire seamen at any one of a number of ports in order to replace those who have signed off or those who, by reason of illness, are unable to continue, the desirability of the application of the law of the flag to employer-employee relationships is clear:

The Danish shipowner operating a vessel under the Danish flag is subject at all times to the provisions of the Danish law, both with respect to the operation of his ship and with respect to payment into the government insurance fund to provide for the payment of compensation to injured seamen. This Danish shipowner is unable to avoid these responsibilities regardless of the scene of the operations of his vessel. Regardless of where the ship might be, the seamen aboard are guaranteed certain fundamental rights and benefits. For that reason they subscribe to the Danish Seamen's Act at the time they sign articles. Such a signing is a two-way operation. Not only does the seaman agree to be bound on his part by the Danish law, but at the same time, and this should be remembered, the Danish shipowner contracts with the seaman on his part to carry out all his responsibilities and to provide to the seaman all the benefits to which he is entitled under the various provisions of the Danish law. The benefits of these laws are uniformly available wherever a Danish consulate exists (21).

The master of the Danish vessel is continually under the supervision of the Danish consulate at every port of call, and it is the responsibility of the consuls to enforce the Danish law with respect to those vessels.

If the mere fact of a sign-on in the United States is sufficient in and of itself to give to a seaman rights under the United States Jones Act, regardless of the site of the injury and regardless of the lapse of time between the sign-on and the injury, then how is that seaman going to enforce his rights under the United States law? Are the remedies available to him to be dependent upon his return to the United States in order to start an action in a District Court? What if the man were totally disabled and unable to leave his native land to prosecute his cause of action in our country?

Compare to these uncertainties the fact that a Danish seaman can obtain a recovery for injuries sustained, regardless of any negligence on the part of the shipowner or its agents or employees, not only in Denmark but before any Danish consul anywhere in the world. The recovery under the law of the flag is a recovery which is sure, universally available, enforceable regardless of any return to the United States, and one that cannot be avoided by the shipowner since he, too, is bound by the law of the flag to carry out his obligation.

## POINT IV

**The facts in this case are not governed by the decisions of the Court of Appeals for the Second Circuit in *Kyriakos* v. *Goulandris* or *Taylor* v. *Atlantic Maritime Co.***

Upon the trial of this case in the United States District Court for the Southern District of New York motions were made on behalf of the defendant at the end of plaintiff's case, at the end of defendant's case and after the jury

verdict to dismiss the complaint for lack of jurisdiction, and all were denied by the Trial Court (61, 97, 116 and 117). These motions were made on the grounds that this was an action between citizens of Denmark and, therefore, outside the jurisdiction of the Court and outside the framework of the Jones Act. The Trial Court also denied defendant's request to charge that the jury must find for the defendant if it found that the defendant had fulfilled its obligations under the Danish law (113), and the defendant excepted to the charges of the Trial Court that the defendant was liable to the plaintiff for injuries caused by the negligence of defendant's officers and seamen (113) no such right being given by the Danish law, and the charge that the Danish law had no application in the case (114-115).

Thereafter, the defendant, the petitioner herein, J. Lauritzen, appealed from the judgment in favor of the plaintiff as entered on December 21, 1951, and in particular from the denial of the above motions made by the defendant as well as from the above denial of defendant's requests to charge and from the charges of the Trial Court to the effect that American law, rather than Danish law, was to be applied. The United States Court of Appeals for the Second Circuit affirmed the judgment of the Trial Court solely on the authority of *Kyriakos* v. *Goulandris*, 151 F. (2d) 132, 1945 A. M. C. 439 (2 Cir., 1945) and *Taylor* v. *Atlantic Maritime Co.*, 179 F. (2d) 597, 1950 A. M. C. 352, (2 Cir., 1950) cert. den. 341 U. S. 915, 71 S. Ct. 736.

It is submitted that the facts in this case are such that they are not governed by the decisions in *Kyriakos* v. *Goulandris, supra, and Taylor* v. *Atlantic Maritime Co., supra*, but that they require an independent ruling as to the applicability or non-applicability of the Jones Act. In addition, it is submitted that the holdings and the decisions of the Court of Appeals for the Second Circuit in both *Kyriakos* v. *Goulandris* and *Taylor* v. *Atlantic Maritime*

*Co.* were at least in part erroneous in that they have extended the application of the Jones Act beyond its intended field.

Since the Court of Appeals for the Second Circuit in a *per curiam* opinion has seen fit to affirm the judgment of the Trial Court based solely on a citation of these two decisions, a close examination of the authorities is warranted.

In 1937 in *The Paula*, 91 F. (2d) 1001, 1937 A. M. C. 988, cert. den. 302 U. S. 750, 58 S. Ct. 270, the United States Court of Appeals for the Second Circuit affirmed the District Court decree in a case involving a German seaman who had signed articles in Chile to serve on a Danish ship on a voyage to Brooklyn, New York. While the vessel was at the intermediate port of Jacksonville, Florida, the libelant was injured during the performance of his duties on board the ship. The District Court declined jurisdiction and relegated the seaman to his claim under Danish law before the Danish consul. In disposing of libelant's claim that the District Court had jurisdiction under Section 33 of the Merchant Marine Act of 1920, Judge Swan wrote (pp. 1003, 1004):

> "The libelant claims not only under the maritime law but also under section 33 of the Jones Act (46 U. S. C. A. § 688). He asks us to rule that this applies to an alien seaman on a foreign ship who signed on at a foreign port, if he sustains injury in a port of the United States through the negligence of a fellow seaman. This question was expressly left open in Plamals v. Pinar Del Rio, 277 U. S. 151, 155, 48 S. Ct. 457, 72 L. Ed. 827. Precise authority on it is meager. Such as there is has answered the question in the negative. The Seirstad, 27 F. (2d) 982 (D. C. E. D. N. Y.); The Magdapur, 3 F. Supp. 971 (D. C. S. D. N. Y.). * * * We think the intention to legislate for alien seamen who have signed articles abroad on a foreign ship ought to be clearly expressed before the courts extend the statute to them."

With respect to the libelant's recovery under the Danish law, the opinion reads as follows (at p. 1003):

> "It is not disputed that the Danish law gives the libelant a right to medical expenses for a limited period (which the respondent has already satisfied) and a right to compensation for injuries from a governmental insurance fund, out of which payment may be obtained in the United States by presentation of a claim to the Danish Consul. These rights are substitutes for maintenance and cure and the right to indemnity recognized by the general maritime law, and the substituted remedy is available in New York where the alien and his witnesses are present; hence no injustice results from leaving him to that remedy."

In 1942, in *Gambera* v. *Bergoty*, 132 F. (2d) 414, 1943 A. M. C. 45; cert. den. 319 U. S. 742, 63 S. Ct. 1030, 87 L. Ed. 1699, the United States Court of Appeals for the Second Circuit modified the doctrine of *The Paula* to the extent that relief under the Jones Act was granted to an Italian seaman injured on board a Greek ship in territorial waters of the United States. In denying the respondent's motion to dismiss the libel in the District Court, Judge Coxe commented on the facts in the following terms (39 F. Supp. 871):

> "The affidavits submitted on behalf of the libelant show that he is an Italian, who has resided since 1920 in the United States. He served in the United States Army in 1927 and 1928, receiving an honorable discharge on March 12, 1928, and in 1937 filed his first papers for naturalization as a United States citizen. He was hired by the captain of the S.S. Emmy at Trenton on December 21, 1939, for a voyage to Philadelphia and Norfolk, and thence to New York, where he was to be discharged. The injury took place on December 23, 1939, as the vessel was proceeding from Trenton to Philadelphia. * * * He has never been in Greece, does not speak the language, the witnesses are here, and it would be a clear denial of justice if he were required to go to Greece to litigate his claim."

That the United States Court of Appeals for the Second Circuit, in affirming the denial of respondent's motion to dismiss, considered the locus of the voyage and the citizenship status of the libelant significant, is shown by the language of Judge Learned Hand (132 F. (2d) 415):

> "Not only had the libelant been domiciled in the United States for over twenty years, during the greater part of which he had served on American ships, but the voyage began and ended in the United States; it was from Trenton to Philadelphia, Norfolk and New York, and he was injured on the leg between Trenton and Philadelphia. The whole voyage was thus to be performed within our territorial waters except possibly for a part of the leg between Norfolk and New York. *That presents a wholly different situation from any that have hitherto arisen.*" (Emphasis supplied.)

Judge Learned Hand held that Gambera's libel stated a good claim *in personam* which should be tried on the merits. The doctrine of *The Paula,* therefore, was modified, but only to the extent that relief was granted because of the pseudo-United States citizenship of the libelant, because the voyage began and ended within the territorial limits of the United States, and because the injury occurred within United States waters.

Even after the decision in *Gambera* v. *Bergoty, supra,* it had never yet been held that the terms of the Jones Act were applicable to an injury sustained by a bona fide alien serving aboard a foreign vessel, quite irrespective of the place of the injury.

The first deviation from this principle and from the accepted interpretation of the intended application of the Jones Act occurred in the decision of the United States Court of Appeals for the Second Circuit in *Kyriakos* v. *Goulandris, supra,* in 1945.

Kyriakos, a citizen of Greece, was employed as a fireman aboard the S.S. Theomitor, and sued to recover for injuries sustained as a result of an assault by a fellow seaman in April, 1942, in Fernandina, Florida. He asserted causes of

action for cure, maintenance and wages to the end of the voyage, and, under the Jones Act, for damages arising from the negligence of the respondents, their servants and employees. The articles signed by Kyriakos in New York City in March, 1941, called for a voyage from Newport News to England and back to the United States. Kyriakos was engaged along with several others at the office of the Greek Line in New York, pursuant to orders received from the captain of the vessel. The Greek Line paid the expenses of his transportation to Newport News, where he joined the ship. The Trial Court, in an opinion by Judge Bondy, awarded Kyriakos the sum of $17,500 as damages, holding that Kyriakos was entitled to maintain his action under the Jones Act. The reasons for this decision are set forth in the opinion of Judge Bondy (63 F. Supp. 19, 20):

> "The libellant is a citizen of Greece. He was assaulted at Fernandina, Florida, by a fellow seaman while serving as a fireman on the *Theomitor*, a vessel flying the flag of Greece and owned in Greece by the respondent Michael Polemis.
>
> The libellant was hired for a voyage from Newport News, Virginia to England and back to the United States.
>
> The fact that the libellant was an alien seaman serving upon a foreign ship owned and operated by aliens does not deprive him of the right to maintain this action under the Jones Act, in view of the fact that he resided in the United States, that he was injured within territorial waters of the United States while in the service of the ship on a voyage that began and was to end in the United States. *Gambera* v. *Bergoly*, 2 Cir., 132 F. (2d) 414, certiorari denied 319 U. S. 742, 63 S. Ct. 1030, 87 L. Ed. 1699; See *Uravic* v. *Jarka Co.*, 282 U. S. 234, 239, 51 S. Ct. 111, 75 L. Ed. 312. Compare *The Paula*, 2 Cir., 91 F. (2d) 1001."

Subsequently, the respondents appealed from the judgment of the trial court to the United States Court of Appeals for the Second Circuit. On the appeal it was contended by the appellants that Kyriakos could not sue

under the Jones Act, because it gave no remedy to an alien employed on a foreign ship. The Court of Appeals for the Second Circuit, in an opinion by Judge Augustus Hand, could find nothing in the record to support the statement of Judge Bondy that the libelant was a resident of the United States, since Kyriakos had testified that he had come to this country as a seaman and had signed off the vessel which had brought him to the United States because it was undergoing repairs. On this point, Judge Augustus Hand wrote as follows (151 F. (2d) 136):

> "He had been here for an unspecified period, which was certainly less than three months, when he signed on the *Theomitor*. His stay in this country since his injuries were sustained is not sufficient, under all the circumstances, to show that he had acquired a residence in the United States when he signed on which would give him a right of action under the Jones Act. *Gambera* v. *Bergoty*, 2 Cir., 132 F. (2d) 414, certiorari denied 319 U. S. 742, 63 S. Ct. 1030, 87 L. Ed. 1699."

After conceding in this manner that the facts of the case were not such as to fall within the holding of *Gambera* v. *Bergoty, supra*, Judge Augustus Hand framed the question presented to the Court in the following terms (at p. 136):

> "We are thus called upon to determine whether an alien seaman who signed on in an American port for a voyage beginning and ending in American waters can sue under the Jones Act."

The opinion of the Court then followed with a reference to *Strathearn S.S. Co. v. Dillon*, 252 U. S. 348, which has been discussed in this brief under Point I. The majority concluded, on the authority of *Patterson* v. *Bark Eudora*, 190 U. S. 169, and *Strathearn S.S. Co.* v. *Dillon, supra*, that Congress undoubtedly had authority to make a statute such as the Jones Act applicable to foreign vessels in our ports.

In answer to the question posed as to what the Court was called upon to determine, Judge Augustus Hand wrote as follows (at p. 137):

> "In the instant case the libelant signed on in an American port, *and he was injured in an American port*. We think this is sufficient both on reason and on authority. The intention of Congress to benefit American seamen would not be served by a contrary construction of the statute, since it would tend to encourage the hiring of foreign seamen *in American ports* in preference to American seamen because the aliens would not have the right of suit against their employers *if injury should occur in those ports*, while American seamen would." (Emphasis supplied.)

The discrepancy between the framing of the question presented to the Court, as set forth on page 136, and the answer, as set forth on page 137 of the opinion in 151 F. (2d), should be noted. The opinion states that the Court was called upon to determine whether an alien seaman who signed on in an American port for a voyage beginning and ending in American waters could sue under the Jones Act. But the answer, as set forth on page 137, makes much of the fact that the injury itself took place in an American port.

There is nothing in the opinion of the majority to indicate that the holding would have been the same had Kyriakos been injured either on the high seas or in a foreign port.

It is submitted that the court begged the issue in citing the *Strathearn* and *Patterson* cases as authority for their conclusion. As has already been pointed out, both these cases dealt with the constitutionality of sections already made specifically applicable to foreign vessels. The court totally ignored the fact that the Jones Act contains no such provision.

An extremely strong dissent to the opinion of the majority was written by Judge Learned Hand and is reported at 151 F. (2d) 139-140. Judge Learned Hand opened by

discussing the principle of the law of the flag in a portion of the dissent already quoted at pages 42-3 of this brief. With further reference to the doctrine of the law of the flag and its possible exceptions, Judge Learned Hand wrote as follows at page 139:

> "There are occasions, of course, when the state of the port has an overriding interest in insisting upon its own ideas; but in the case at bar the question does not touch a breach of our peace, or, as I shall try to show, an object in which it can be supposed that we have any interest. If so, I submit that we should demand the clearest warrant before we substitute the Jones Act—primarily at any rate a local statute—for the pertinent law of Greece.
>
> As I have just said, I can discover no reason of policy or of authority for displacing that law."

Then on page 140 Judge Learned Hand discussed the two cases relied upon by the majority in support of their opinion as follows:

> "My brothers' main reliance appears to be Patterson v. The Eudora, 190 U. S. 169, 23 S. Ct. 821, 47 L. Ed. 1002 and Strathearn SS Co. v. Dillon, 252 U. S. 348, 40 S. Ct. 350, 64 L. Ed. 607. The second can at once be ruled out. When Congress added to the proviso that 'the courts of the United States shall be open to such seamen for its enforcement', I do not see how the court could escape concluding that foreign seamen were intended. As applied to that statute, unlike the one at bar, there was a good reason for this. * * * As to Patterson v. The Eudora, supra, I agree that it is practically certain that some of the libelants were foreigners. However, the point was not discussed—indeed it was not even alluded to—it does not seem to me that we should treat it as a decision. All the court was really concerned about was whether Congress could constitutionally make the act against crimping seamen apply to foreign ships. * * * Finally, I do not read the opinion in that case as holding that the title of the act is never in any way relevant to its interpretation; on the contrary, all the court meant was that in that particular case the plain language of the act itself forbade the title to be taken as controlling."

The differences in the essential facts of the *Kyriakos* case and the instant case are numerous.

First, Kyriakos signed articles for a voyage from a United States port to England and then back to the United States. Larsen, however, signed articles in a United States port, calling for a voyage to South American ports and further, binding Larsen to serve aboard the vessel for an indefinite period, while at the same time granting him the right to give seven days' notice of his intention to leave the vessel. Nothing in the articles signed by Larsen indicated that the vessel was to return to the United States or that the owner was under any obligation whatsoever to return him to the United States for discharge.

Secondly, Kyriakos was injured ashore in Fernandina, Florida, when he was assaulted by a fellow crew member, who had also been signed on at the same time as Kyriakos. Larsen, on the other hand, was injured aboard the Danish vessel, S.S. Randa, while that vessel was moored in Havana, Cuba. The opinion of Judge Augustus Hand in *Kyriakos* v. *Goulandris, supra,* indicates clearly that the majority was greatly swayed by the fact that the injury to Kyriakos had occurred in a United States port.

Thirdly, there is nothing in the opinions to indicate that Kyriakos received any benefits or obtained any recovery under the Greek law, the law of the flag. As a matter of fact, at the time of the injury, Greece itself was in the hands of the German occupation forces, having been so since 1941, and whatever Greek government was in power at the time was, at best, a government in exile with no authority within its own country. Larsen, however, did recover all the benefits to which he was entitled under the terms of the Danish seamen's law and under the terms and conditions of the articles which he had signed on the Danish form. In addition, as has been pointed out under the Statement, there were available to Larsen additional medical benefits, if such had been required, in Denmark, but Larsen refused the offer of repatriation. Repatriation in the case

of Kyriakos was obviously impossible. In short, Kyriakos had no remedy available to him other than under the United States law.

The chasm existing between the instant case and *Kyriakos* v. *Goulandris, supra,* is supported by the opinion of Judge Learned Hand in *O'Neill* v. *Cunard White Star, Ltd.,* 160 F. (2d) 446, 1947 A. M. C. 505 (2 Cir., 1945). The United States Court of Appeals for the Second Circuit, in an opinion by Judge Learned Hand, stated that the provisions of the Jones Act did not appear to be applicable to an injury sustained on the high seas. In deciding whether the Jones Act was applicable to a British seaman injured on the high seas aboard a British vessel, the opinion discussed the cases of *The Paula, supra, Gambera* v. *Bergoty, supra,* and *Kyriakos* v. *Goulandris, supra,* and with respect to these three cases wrote as follows (160 F. (2d) 448):

> "The three decisions we have mentioned do not help us to decide whether we should now hold that the Jones Act interposes to change what would otherwise be the rights and duties of the parties, because in all three the act or omission was within our waters."

The very same argument must be applied here, for Kyriakos was injured in a United States port, whereas Larsen was injured aboard the vessel in a foreign port, and if the *Kyriakos* case did not help the Court decide the *O'Neill* case, it most certainly cannot be cited as authority for the instant one.

The second case relied upon by the United States Court of Appeals for the Second Circuit in affirming the judgment of the Trial Court in the instant matter is *Taylor* v. *Atlantic Maritime Co., supra.*

The decision of Judge Hulbert in the United States District Court for the Southern District of New York on defendants' motion to decline jurisdiction is reported at 86 F. Supp. 496, 1949 A. M. C. 1192, and indicates that Taylor signed articles at Norfolk, Virginia, on August 7, 1947, as

an able-bodied seaman, and continued in the employ of the defendants on the vessel s/s Atlantic Air until November, 1948. The complaint alleged that in March, 1948, Taylor became very sick "through no fault of his own, but entirely through the fault of the defendants, their agents, servants and employees, in failing to furnish him with a safe place in which to work, and to provide him with a safe and seaworthy vessel." It was also alleged in the complaint that the plaintiff was a resident of the City of New York, of Panamanian nationality, and that the defendant Atlantic Maritime Company was a Panamanian corporation, existing under and by virtue of the laws of Panama, doing business through its agent S. Livanos & Co., with an office in the City of New York. In the course of the opinion, Judge Hulbert pointed out that there was nothing in the moving papers to indicate where the vessel went after leaving Norfolk, Virginia, except that in August of 1948 the vessel was in Sydney, Australia. Judge Hulbert granted the motion, and wrote as follows (at p. 498):

> "The Jones Act does not afford protection to 'a seaman of foreign residence and nationality, suing a non-American ship owner for an alleged tort committed on a non-American ship on the high seas.' *Solnesen* v. *Panama Transport Co.*, 298 N. Y. 262, 82 N. E. 2d 569, 570; cf. also *O'Neill* v. *Cunard White Star, Ltd.*, 2 Cir., 1947 A. M. C. 505, 160 F. (2d) 446. The General Maritime Law of the United States is also not applicable to the facts of this case, but rather under familiar principles the law of the flag, viz. Panama, is the law that must be applied. Under these circumstances, this Court should not entertain jurisdiction of this action, but should relegate plaintiff to the appropriate forum in Panama."

Thereafter the plaintiff appealed from this judgment dismissing his complaint, but died before the decision of the United States Court of Appeals for the Second Circuit. The opinion of the Court of Appeals was written by Judge Learned Hand, who had written the very strong dissent

to the *Kyriakos* case and who, in the *O'Neill* case, had held that the provisions of the Jones Act were not intended by Congress to be applicable to injuries sustained on the high seas. The holding of the Court was that the Jones Act was applicable to the recovery sought by the Panamanian seaman against the owners of the Panamanian vessel for the latter's failure to provide proper care and attention aboard the vessel, all of which allegedly led to aggravation of the plaintiff's tubercular condition, the plaintiff having signed articles in Norfolk, Virginia.

Such a short summary, however, of the holding of the Court can in no way convey the sense of reluctance which pervades the entire opinion. In order to convey properly this sense of reluctance, it would be necessary to quote the entire opinion at length, but suffice it to say for the moment that the opinion contains many more arguments for not applying the Jones Act than for reaching the conclusion which the Court eventually did.

Judge Learned Hand outlined the arguments and, from all appearances, seemed to support these negative arguments in the following terms (179 F. (2d) 600):

> "Judge Clark thinks that, since the overriding purpose of the Jones Act is to protect seamen, it should be understood to include alien seamen and that the law of the flag must yield. Indeed, so far as concerns American seamen, we decided as much in Gambera v. Bergoty, supra; and it must be conceded that, if the doctrine there accepted does not extend to aliens who sign articles in an American port, American citizens may be at a disadvantage as against aliens in shipping foreign. To Judge Swan and me it seems, on the other hand, that, *before we impute to Congress the will to change the long settled international understanding that the law of the flag controls in such matters, we should find a more definite expression of that purpose.* We of course recognize that it is only a question of interpreting the statute, not of power; but the possible consequences of the innovation seem to us to forbid its ready assumption under the facile phrase of the 'policy of the Act.' Nor does the possible disadvantage,

at which our view might put American seamen, seem to us considerable enough to imply such a purpose, for there will be, we should suppose, only rare occasions when American seamen will find themselves forced to accept the greatly inferior standards of wages and living which prevail on most, if not all, foreign ships. Moreover, we both find strong support for our view in the decision of the Court of Appeals in Sonnesen v. Panama Transport Company, which is on all fours with the case at bar." (Emphasis supplied.)

The above language which appears in the closing paragraph of the opinion clearly indicates that Judge Learned Hand, as well as Judge Swan, were unwilling to impute to Congress the will to change the long-settled international understanding that the law of the flag should control in such matters unless they could find a "definite expression of that purpose".

Yet, there follows a startling conclusion which constitutes a complete reversal of the field, for instead of denying the applicability of the Jones Act, which the whole tenor of the opinion up to this point would indicate was the intention, Judge Learned Hand closed as follows (at page 600):

"*Nevertheless, in spite of what we should hold, were we free,* we think that, although Kyriakos v. Goulandris, supra, can be distinguished because the injury took place on shore, the rationale of the opinion went further; and that *it construed the Jones Act as imposing its terms upon all owners who sign on crews in an American port.* We do not think it fitting (especially in my own case) to distinguish that decision *by a circumstance which was not made pivotal;* but rather that we should accept and apply its doctrine as broadly as it seems to have been intended to go. Therefore, though for somewhat different reasons, we all agree that the judgment be reversed, and the action remanded for trial. Since the plaintiff died pending the appeal the suit must be revived under our Rule 9; but when that has been done, the judgment will be reversed." (Emphasis supplied.)

Referring to the earlier language of the opinion, we must conclude that the Court had found a definite expression of the purpose of Congress to change the long-settled international understanding that the law of the flag controlled in such matters. Where did the Court find this definite expression of the will of Congress? They found it, not in any language of the statute, not in any expression of Congress, but in their own decision in *Kyriakos* v. *Goulandris*, while at the same time admitting that the latter case could be distinguished on the grounds that the injury took place ashore in the United States.

How could the Court conclude that a decision holding the Jones Act applicable to a foreign seaman injured in a United States port, constituted a definite expression of the intent of Congress to change the law with regard to an injury sustained by a foreign seaman aboard a foreign vessel while outside the United States?

The closing sentences of the opinion quoted above make it abundantly clear that the Court considered itself bound by its own decision in *Kyriakos* v. *Goulandris*, with the result that it was held that the lone fact that the articles were signed by the foreign seaman in a United States port was sufficient to require the application of the Jones Act to a recovery for illness on the high seas. It should be noted that Judge Learned Hand said that he did not consider it fitting to distinguish *Kyriakos* v. *Goulandris* "by a circumstance which was not made pivotal", referring to the fact that Kyriakos was injured ashore in the United States in the course of a voyage which was to start and terminate in the United States. It is submitted that the fact that Kyriakos was injured in the United States during the course of a voyage starting and terminating in the United States was a definite factor in leading that same Court to hold that the Jones Act was applicable in that case, and there is ample support for this contention in the language of Judge Augustus Hand in the *Kyriakos* case, quoted earlier. That language indicated that the whole decision

in *Kyriakos* v. *Goulandris, supra,* was predicated on the three factors involving the United States, i.e., signing on in the United States, a voyage starting and terminating in the United States, and, finally, injury occurring within the United States. That Justice Learned Hand earlier considered these factors to have been "pivotal" is shown by the fact that in *O'Neill* v. *Cunard White Star, Ltd., supra,* he took pains to distinguish the *Kyriakos* case, since the *Kyriakos* case involved an act or omission committed within United States waters. Why were these distinctions pivotal in 1947, but not in 1950?

Surely, Judge Learned Hand carried the doctrine of *stare decisis* to an extreme in considering himself governed by a decision which, five years earlier, he had considered totally without foundation, authority or desirability. Was he repudiating his own dissent in the *Kyriakos* case?

But even if we were to concede for the purposes of argument that the decision of the United States Court of Appeals for the Second Circuit in *Taylor* v. *Atlantic Maritime Co., supra,* was correct, the differences in the essential facts of the *Taylor* case and the instant case are so numerous as to require a holding that the *Taylor* case is no more authority for a decision on this matter than was *Kyriakos* v. *Goulandris, supra.*

Taylor was a Panamanian national, and it was alleged in the complaint that he was a "resident of the City of New York, State of New York" (86 F. Supp. 496). Larsen, the plaintiff herein, was a Danish citizen and a resident of Denmark, who was temporarily in New York City at the time he signed articles to serve aboard the S.S. Randa (pre-trial order, 16, 44, Defendant's Exhibit A, 44, 45).

At the time Taylor served aboard the S.S. Atlantic Air, she was of Panamanian registry and was owned by Atlantic Maritime Company, a corporation registered in Panama. The history of the vessel, however, indicates that she was the S.S. Elizabeth Blackwell and, until 1947, was owned by the United States War Shipping Administration, having been built in California in 1943. Until 1947, Atlantic

Maritime Company was not listed in Lloyd's Register of Shipping as a shipowner, but after that year Atlantic Martime Company was listed as a Panamanian shipowner, owning ten ships, all of them ships previously owned by the United States War Shipping Administration. Briefs filed on behalf of Taylor's administrator in this Court in opposition to the petition of Atlantic Maritime Company for a writ of certiorari indicate that the true situs of the control and operation of this vessel flying the Panamanian flag was in the United States. Since Taylor's cause of action never proceeded to trial, the exact nature of the operation and control of the S.S. Atlantic Air have not been brought out.

There is nothing in the record and in the final judgment in this case to indicate that the S.S. Randa was not a legitimate Danish vessel flying the Danish flag, registered in Denmark, and owned and operated by the Danish petitioner (pre-trial order, 16).

The *Taylor* case was an action to recover for aggravation of tuberculosis caused by the alleged failure of the shipowner to give the seaman proper care on board the ship. By reason of the nature of the illness, and the length of service of the seaman aboard the vessel, however, there was no specific geographical spot where it could be said that the conduct of the shipowner rendered it liable to the plaintiff, for it must be assumed from what we know that the shipowner's failure to give proper care was a continuous failure extending over the entire period of time that the plaintiff was aboard the vessel. The only geographical spot having any tangible significance, therefore, was the place of sign-on; that is, Norfolk, Virginia. In the instant action, the plaintiff-respondent has obtained a final judgment for a specific incident occurring aboard the owner's vessel while that vessel was moored in Havana, Cuba. Unlike the *Taylor* case, we can now point to specific conduct aboard the S.S. Randa in a specific foreign port where the

shipowner incurred a possible tort liability, and there is no longer any need to refer to the port of sign-on in an effort to resolve the conflict of laws problem.

Although the opinion in the *Taylor* case does not specifically state that Taylor did not recover from the shipowner under the Panamanian law, the law of the flag, the entire tenor of the opinions make it clear that the plaintiff in that case had sought to recover solely under the terms of the Jones Act, and had not proceeded under the terms of the Panamanian articles which he had signed. In the instant case, however, as shown in the Statement, Larsen recovered from the Danish shipowner all the benefits to which he was entitled under the terms of the articles which he had signed and under the provisions of the Danish Seaman's Law. That Larsen accepted all of these benefits is significant in that he had chosen to bind himself by the terms of the articles which he signed as long as they would be of benefit to him, but later sought, in addition, to go outside the terms of these articles in order to recover from the Danish shipowner under the laws of the United States.

Lastly, what was involved in the *Taylor* case was a question of the contractual obligation of the shipowner to care for an ill seaman, whereas in the instant case the question involved is one of whether the tort liability of a fellow-seaman of Larsen's is to be imputed to Larsen's Danish employer.

It is submitted, therefore, that the facts of and the law applicable to the instant case are not governed by the decision of the United States Court of Appeals for the Second Circuit in *Taylor* v. *Atlantic Maritime Co.*, *supra*.

These two decisions have been gone into at some length in order to show the state of confusion and contradiction in the Court of Appeals which led to a total disregard of the authorities and of the possible repercussions of this misapplication of the Jones Act. On the one hand, we have Judge Learned Hand's strong dissent in *Kyriakos* v. *Goulandris*, *supra*, on the grounds that the authorities relied upon by the majority were inapplicable and irrelevant.

Then five years later, in a case involving the obligation of a foreign shipowner to care for a foreign seaman ill aboard its vessel (not a case of the liability of a foreign shipowner for an injury sustained within the United States), we find that Judge Learned Hand, now speaking for the majority, falling into the very same trap which he accused the majority of falling into five years earlier. Although the opinion in the *Taylor* case says that the court should find a "definite expression" of the purpose of Congress to change the long-settled international understanding as to the application of the law of the flag, the "definite expression" finally relied upon is no more than the very decision in the *Kyriakos* case with which he violently disagreed five years earlier.

By tracing the development of the application of the Jones Act to foreign seamen aboard foreign vessels all the way from the decision in *The Paula,* 91 F. (2d) 1001, in 1937 to *Larsen* v. *J. Lauritzen,* 196 F. (2d) 220 in 1952 we can see how each case involved slightly different facts and how, by permitting itself to be bound by prior decisions, the Court of Appeals maneuvered itself into a position where it was forced to ignore the language of the statute and the evidence of Congress' intent not to apply the statute to foreign seamen aboard foreign vessels injured outside the United States. As a result, the Court of Appeals has applied domestic statute law to the internal affairs of a foreign vessel outside the territorial waters of the United States, an application which flies in the teeth of long-settled international law recognized by our courts and Congress.

## CONCLUSION

**The judgment below should be reversed.**

Dated, New York, November 25, 1952.

Respectfully submitted,

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